Dr Chandran a/l Gnanappah v Gan See Joe (suing as the administrator of the estate of Gan Hong Wee, deceased) & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(NCvC)(W)-263–02 OF 2023 AND B-02(NCvC)(W)-231–02 OF 2023
SUPANG LIAN, WONG KIAN KHEONG AND FAIZAH JAMALUDIN JJCA
19 MAY 2025

Tort — Negligence — Medical negligence — Breach of duty of care — Plaintiff's claim against defendants under medical negligence for causing death of deceased allowed by High Court — Whether first defendant committed professional medical negligence to deceased — Whether first defendant's negligence contributed materially to deceased's death — Whether second defendant vicariously liable for first defendant's negligence — Whether second defendant owed non-delegable duty of care to deceased — Whether second defendant liable to deceased's estate for late disclosure of ICU chart — Whether High Court's decision on second defendant's liability to deceased's estate was valid — Whether there should be appellate intervention regarding High Court's award in damages — Whether High Court could impose interest at rate of 8%pa on general damages — Whether High Court erred in deciding first defendant's contribution of total damages and interest

The second defendant owned and managed a private hospital ('the hospital'). By virtue of a consultancy agreement, the first defendant was an independent contractor of the second defendant and carried out his medical practice as an ear, nose and throat consultant in the hospital. On 27 March 2014 at about 11am, the deceased was brought to the hospital by his brother and mother ('Madam Ng'). The deceased's CT scan of his brain showed that all his sinuses were almost completely filled with retained secretions and consequently referred to a consultant neurologist ('Dr Raihanah'). Dr Raihanah diagnosed him with pansinusitis with possible meningitis, optic neuritis and seizures; and administered three types of intravenous antibiotics to the deceased. Dr Raihanah then referred the deceased to the first defendant who then examined the deceased without the presence of the deceased's family members. The first defendant referred the deceased to an ophthalmologist ('Dr Meena') and also filled in and signed a 'guarantee letter request form' to the deceased insurer stating that a sinus surgery had to be performed on the deceased. Dr Meena examined the deceased and diagnosed the deceased with pansinusitis with meningeal spread causing bilateral optic neuritis. Dr Meena explained to

A the deceased's family members of her diagnosis and proposed treatment but the proposed treatment had to wait for 48 hours because of Dr Raihanah's antibiotics administration. On 28 March 2014, the deceased did show any improvement and hence the first defendant met the deceased's parents ie PW1 and Madam Ng, in the presence of the deceased to advise that it was B necessary to conduct the sinus surgery later on that day itself. PW1 gave consent for the sinus surgery and the first defendant performed the sinus surgery on the deceased. After the sinus surgery, the deceased was restless and delirious. Hence, he was intubated, transferred to the hospital's intensive care unit ('ICU') and did not regain consciousness. On 7 April 2014, due to C financial constraint of the deceased's family, the deceased's family transferred the deceased to Hospital Kuala Lumpur ('HKL'). However, the deceased passed away in HKL on 30 April 2014. The cause of the deceased's death was encephalitis of unknown aetiology. The deceased's brother as his first administrator of the estate filed an application in the High Court against the D second defendant for a pre-trial discovery order to compel the second defendant to disclose all the reports, records and documents of the second defendant regarding the deceased. However, it was discontinued after the second defendant had voluntarily disclosed the records to the first administrator. The first administrator of the estate then filed a suit against the E first and second defendants. In the suit, the second defendant applied for an indemnity or contribution from the first defendant in the event that the second defendant was liable to the deceased's estate. During the trial, it was discovered that the second defendant had not given to the deceased's estate eleven pages of a chart regarding the deceased's admission into the ICU ('ICU chart') but was F later served on all the parties. The learned High Court judge ('HCJ') held, inter alia, that both the defendants were liable to the deceased's estate and awarded damages. With regard to the second defendant's indemnity or contribution claim, the second defendant was entitled to claim from the first defendant 80% contribution of the total damages and interest awarded by the High Court G against the second defendant. Hence, these appeals by the first and second defendants. The first defendant submitted that: (a) there was no link between the manner in which the first defendant had obtained PW1's consent and the death of the deceased; (b) the High Court's finding of fact that the first defendant was negligent in carrying out the sinus surgery was 'plainly wrong'; H (c) there was no evidence to prove that the sinus surgery had materially contributed to the deceased's death; (d) the second defendant owed a non-delegable duty of care to the deceased and upon the breach of such a duty, the second defendant could not claim any indemnity or contribution from the first defendant; and (e) the High Court had erred in awarding the sums of I damages. The second defendant submitted, inter alia, that: (i) the first defendant was only an independent contractor and not an employee of the second defendant. Accordingly, the second defendant could not be vicariously liable to the deceased's estate for the first defendant's professional medical negligence; (ii) the late disclosure of the ICU chart did not materially

contribute to the death of the deceased; (iii) the first defendant and not the second defendant had a duty of care to give proper advice to the deceased's parents regarding the deceased's proposed treatment in the form of the sinus surgery and ensure that PW1's consent regarding the sinus surgery was an informed one; (iv) the second defendant did not owe a non-delegable duty of care to the deceased because the fifth 'feature' for the imposition of a non-delegable duty of care as laid down in *Woodland v Swimming Teachers Association & Ors* [2014] AC 537 ('Woodland') had not been fulfilled; and (v) the second defendant was entitled to a 100% indemnity from the first defendant. The issues for consideration were: (A) whether the first defendant committed professional medical negligence to the deceased; (B) whether the first defendant's negligence contributed materially to the deceased's death; (C) whether the second defendant was vicariously liable for the first defendant's negligence; (D) whether the second defendant owed a non-delegable duty of care to the deceased; (E) whether the second defendant was liable to the deceased's estate for the late disclosure of the ICU chart; (F) whether the High Court's decision on the second defendant's liability to the deceased's estate was valid; (G) whether there should be appellate intervention regarding the High Court's award in damages; (H) whether the High Court could impose interest at the rate of 8%pa on the general damages; and (I) whether the High Court erred in deciding the first defendant's contribution of the total damages and interest.

Held, dismissing the first defendant's appeal and allowing the second defendant's appeal in part:

(1) The first defendant had breached his duty of care in his advice to the deceased's parents regarding the sinus surgery. The first defendant had a financial motive for sending the guarantee letter request form before his meeting with the deceased's parents and had no intention to fulfil his duty of care in the first place. Further, the first defendant had prior actual knowledge of Dr Raihanah's diagnosis and Dr Meena's diagnosis/proposed treatment regarding the deceased's brain infection. The High Court's factual finding that the first defendant lacked credibility was supported when the first defendant's guarantee letter request form was concealed from the deceased's parents at the meeting. The first defendant 'rushed' to conduct the sinus surgery on the deceased so as not to forego the monetary benefit. Such a conduct by the first defendant which was relevant under s 8(1) of the Evidence Act 1950 ('the EA') clearly demonstrated the first defendant's financial motive for the breach the first defendant's duty of care (see para 32).

(2) The High Court's finding of fact that the first defendant was negligent regarding his breach of duty of care in the conduct of performing the sinus surgery was not plainly erroneous. Premised on the expert view of PW2 and DW3 ('the joint expert view'), the first defendant was to wait

for at least 24 hours from the time of Dr Raihanah's antibiotics administration before the sinus surgery could be performed by the first defendant ('the view of General Body of Doctors'). The sinus surgery was negligently conducted by the first defendant without giving any opportunity for Dr Raihanah's antibiotics administration to take effect for at least a period of 24 hours. He should have discussed with Dr Raihanah and Dr Meena before proceeding with the sinus surgery. Additionally, the joint expert view was not influenced by 'hindsight bias' or 'outcome bias' as such medical knowledge formed part of the view of General Body of Doctors. DW3 was a consultant neurologist and his expert opinion, together with the expert evidence of PW2, was sufficient to form the view of General Body of Doctors which formed the basis for the High Court to decide that the first defendant had breached the duty of care by performing the sinus surgery. Lastly, the deceased's estate had not suppressed any material evidence at the trial which could justify an invocation of an adverse inference pursuant to s 114(g) of the EA against the deceased's estate (see paras 36 & 38–39).

(3) The first defendant's negligence was 'material contributing causes' of the death of the deceased. If the first defendant had not breached his duty of care in his advice, PW1's consent would not have been given and the deceased's death would have been avoided. Thus, there was link between the way in which the first defendant had obtained PW1's consent and the death of the deceased. The sinus surgery was also unrelated to the deceased's brain infection and could not have cured his brain infection. The deceased's death could have been easily averted 'but for' the breach of the first defendant's duty of care (see paras 41–42).

(4) The HCJ committed an error of law in deciding that the second defendant was vicariously liable to the deceased's estate for the first defendant's professional medical negligence. The first defendant was neither an employee nor an agent of the second defendant. Hence, the second defendant could not be vicariously liable to the deceased's estate for the first defendant's negligence. Furthermore, the first defendant was responsible for his own professional medical negligence. The first defendant had undertaken to be insured by an insurance company acceptable to the second defendant which would provide compensation for the first defendant's negligence (see para 44).

(5) The second defendant had a positive statutory duty under s 31(1)(d) of the Private Healthcare Facilities and Services Act 1998 read with reg 47(1) and (2)(b) of the Private Healthcare Facilities and Services (Private Hospitals and other Private Healthcare Facilities) Regulations 2006 to obtain a 'valid' PW1's consent. The fifth feature of the *Woodland* case was satisfied when the first defendant was negligent with regard to the second defendant's statutory duty in the performance of the very

function assumed by the second defendant and delegated by the second defendant to the first defendant. Therefore, in respect of the second defendant's statutory duty, the second defendant had breached its non-delegable duty of care owed to the deceased (see para 56).

(6) The second defendant's late disclosure of the ICU chart could not support the sole cause of action of the deceased's estate against the second defendant. Furthermore, the second defendant's late disclosure did not materially contribute to the deceased's death. Consequently, the HCJ committed a plain error of mixed law and fact in deciding that the second defendant was liable to the deceased's estate due to the second defendant's late disclosure (see para 57).

(7) The High Court's decision which found the second defendant liable for the deceased's death could be justified solely on the ground of the second defendant's breach of its non-delegable duty of care owed to the deceased (see para 58).

(8) It was clear from s 7(3) of the Civil Law Act 1956 ('the CLA') that the deceased's estate could claim for the benefit of the deceased's estate 'any reasonable expenses incurred as a result of the wrongful act, neglect or default' of the defendants. There was nothing in ss 7 and 8 of the CLA which provided that a claim for special damages in an estate/dependency claim was confined to payment(s) made by the claimant himself or herself. The deceased had died due to the first defendant's professional medical negligence and the second defendant's breach of non-delegable duty of care. Accordingly, the deceased's hospital/medical expenses of RM100,000 constituted 'reasonable expenses incurred as a result of the wrongful act, neglect or default' of the defendants. The High Court had correctly awarded an amount of RM5,000 as expenses for the prayer ceremony because such an amount had been 'incurred as a result of the wrongful act, neglect or default' of the defendants and the sum was not 'so extremely high'. The High Court was justified to award funeral expenses of RM30,000 pursuant to the proviso (ii) to s 7(3) and s 8(2)(c) of the CLA and the amount was not manifestly excessive. Lastly, the deceased's estate could not recover the sum of RM6,000 as special damages for costs for the filing of the pre-trial discovery suit to obtain the second defendant's records regarding the deceased because such a claim had not been prayed for by the deceased's estate in the statement of claim (see paras 60 & 62–66).

(9) The amount of RM100,000 awarded by the High Court for pain, suffering and loss of amenities of life was not manifestly excessive. There was no merit in the contentions of the defendants regarding the High Court's award of loss of contribution of RM288,000 as documents had been adduced at the trial in support of the claim for loss of contribution of the deceased's estate (see paras 67–68).

(10) The existence of aggravating circumstances on the part of the first defendant supported an award of RM350,000 as aggravated damages. The sum of RM350,000 as aggravated damages would not unjustly enrich or overcompensate the deceased's estate; or would not financially ruin the first defendant in an unjust manner. The HCJ however had erroneously exercised his discretion in awarding aggravated damages of RM350,000 against the second defendant because there were no aggravating circumstances on the part of the second defendant which could support, let alone justify, the award. Hence, the award of aggravated damages against the second defendant was set aside (see paras 73, 75 & 77).

(11) The High Court had imposed an excessively high interest rate on the general damages which would unjustly enrich the deceased's estate. Consequently, the interest rate on the general damages was reduced from 8%pa to 5%pa (see para 78).

(12) The second defendant's appeal in respect of the first defendant's 80% contribution was allowed. The first defendant was 100% liable for the second defendant's liability to the deceased's estate. It was only 'just and equitable' under s 10(1)(c) and (2) of the CLA for the first defendant to indemnify 100% of the second defendant's liability to the deceased's estate because the second defendant was neither party nor privy to the first defendant's misrepresentation to the deceased's parents; and the decision to perform the sinus surgery was solely made by the first defendant. Therefore, the first defendant shall indemnify the second defendant in full (see paras 82 & 84).

(13) With regard to costs awarded in the High Court, there was no error of law and/or fact in the exercise of discretion by the HCJ to impose a sum of RM250,000 as getting up against the first defendant. However, the sum of RM75,000 as getting up awarded against the second defendant should be reduced because the High Court had erred in that the second defendant was not vicariously liable to the deceased's estate for the first defendant's professional medical negligence and aggravated damages of RM350,000 should not have been awarded against the second defendant. The sum of getting up against the second defendant should be reduced to RM50,000. As for costs of these two appeals: (a) costs of the first defendant's appeal in a sum of RM70,000 shall be paid by the first defendant to the deceased's estate; and (b) the deceased's estate was only entitled to part of the costs of the second defendant's appeal because the second defendant was only liable to the deceased's estate for a breach non-delegable duty of care to the deceased (see paras 85–86).

[Bahasa Malaysia summary

Defendan kedua memiliki dan menguruskan sebuah hospital swasta ('hospital'). Berdasarkan perjanjian perundingan, defendan pertama adalah kontraktor bebas bagi defendan kedua dan menjalankan amalan perubatannya sebagai seorang perunding telinga, hidung dan tekak di hospital. Pada 27 Mac 2014 kira-kira jam 11 pagi, si mati telah dibawa ke hospital oleh abang dan ibunya ('Madam Ng'). Imbasan CT otak si mati menunjukkan bahawa semua sinusnya hampir penuh dengan rembesan tertahan dan seterusnya dirujuk kepada seorang pakar neurologi perunding ('Dr Raihanah'). Dr Raihanah mendiagnosisnya dengan pansinusitis dengan kemungkinan meningitis, neuritis optik dan sawan; dan memberikan tiga jenis antibiotik intravena kepada si mati. Dr Raihanah kemudian merujuk si mati kepada defendan pertama yang kemudian memeriksa si mati tanpa kehadiran ahli keluarga si mati. Defendan pertama merujuk si mati kepada seorang pakar oftalmologi ('Dr Meena') dan turut mengisi dan menandatangani 'borang permohonan surat jaminan' kepada syarikat insurans si mati yang menyatakan bahawa pembedahan sinus perlu dilakukan ke atas si mati. Dr Meena memeriksa si mati dan mendiagnosis si mati dengan pansinusitis dengan penyebaran meningeal yang menyebabkan neuritis optik dua hala. Dr Meena menjelaskan kepada ahli keluarga si mati mengenai diagnosis dan rawatan yang dicadangkannya tetapi rawatan yang dicadangkan terpaksa menunggu selama 48 jam kerana pemberian antibiotik Dr Raihanah. Pada 28 Mac 2014, si mati tidak menunjukkan sebarang peningkatan dan oleh itu defendan pertama bertemu dengan ibu bapa si mati iaitu PW1 dan Madam Ng, dengan kehadiran si mati untuk menasihatkan bahawa adalah perlu untuk menjalankan pembedahan sinus pada hari itu sendiri. PW1 memberikan persetujuan untuk pembedahan sinus dan defendan pertama menjalankan pembedahan sinus ke atas si mati. Selepas pembedahan sinus, si mati menjadi resah dan meracau. Oleh itu, dia diintubasi, dipindahkan ke unit rawatan rapi ('ICU') hospital dan tidak sedarkan diri. Pada 7 April 2014, disebabkan kekangan kewangan keluarga si mati, keluarga si mati memindahkan si mati ke Hospital Kuala Lumpur ('HKL'). Walau bagaimanapun, si mati meninggal dunia di HKL pada 30 April 2014. Punca kematian si mati adalah ensefalitis dengan etiologi yang tidak diketahui. Adik si mati selaku pentadbir pertama harta pusakanya memfailkan permohonan di Mahkamah Tinggi terhadap defendan kedua untuk perintah penemuan prabicara bagi memaksa defendan kedua mendedahkan semua laporan, rekod dan dokumen defendan kedua berhubung si mati. Walau bagaimanapun, ia telah dihentikan selepas defendan kedua secara sukarela mendedahkan rekod tersebut kepada pentadbir pertama. Pentadbir pertama harta pusaka kemudiannya memfailkan saman terhadap defendan pertama dan kedua. Dalam saman itu, defendan kedua memohon indemniti atau sumbangan daripada defendan pertama sekiranya defendan kedua bertanggungjawab kepada harta pusaka si mati. Semasa perbicaraan, didapati bahawa defendan kedua tidak memberikan kepada harta pusaka si

A mati sebelas halaman carta mengenai kemasukan si mati ke ICU ('carta ICU') tetapi kemudian diserahkan kepada semua pihak. Hakim Mahkamah Tinggi yang bijaksana ('HMT') memutuskan, antara lain, bahawa kedua-dua defendan bertanggungjawab kepada harta pusaka si mati dan menganugerahkan ganti rugi. Berkenaan dengan tuntutan indemniti atau B sumbangan defendan kedua, defendan kedua berhak menuntut daripada defendan pertama sumbangan 80% daripada jumlah ganti rugi dan faedah yang diberikan oleh Mahkamah Tinggi terhadap defendan kedua. Oleh itu, rayuan ini oleh defendan pertama dan kedua. Defendan pertama berhujah bahawa: (a) tiada kaitan antara cara defendan pertama mendapatkan C persetujuan PW1 dan kematian si mati; (b) penemuan fakta Mahkamah Tinggi bahawa defendan pertama cuai dalam menjalankan pembedahan sinus adalah 'jelas salah'; (c) tiada bukti untuk membuktikan bahawa pembedahan sinus telah menyumbang secara material kepada kematian si mati; (d) defendan kedua mempunyai kewajipan penjagaan tidak boleh diwakilkan kepada si mati D dan atas pelanggaran kewajipan itu, defendan kedua tidak boleh menuntut sebarang indemniti atau sumbangan daripada defendan pertama; dan (e) Mahkamah Tinggi telah terkhilaf dalam memberikan jumlah ganti rugi. Defendan kedua berhujah, antara lain, bahawa: (i) defendan pertama hanyalah kontraktor bebas dan bukan pekerja defendan kedua. Oleh itu, defendan E kedua tidak boleh bertanggungjawab secara vikarius kepada harta pusaka si mati untuk kecuaian perubatan profesional defendan pertama; (ii) pendedahan lewat carta ICU tidak menyumbang secara material kepada kematian si mati; (iii) defendan pertama dan bukan defendan kedua mempunyai kewajipan penjagaan untuk memberikan nasihat yang betul F kepada ibu bapa si mati mengenai rawatan yang dicadangkan si mati dalam bentuk pembedahan sinus dan memastikan bahawa persetujuan PW1 mengenai pembedahan sinus adalah termaklum; (iv) defendan kedua tidak mempunyai kewajipan penjagaan tidak boleh diwakilkan kepada si mati kerana 'ciri' kelima untuk pengenaan kewajipan penjagaan tidak boleh G diwakilkan seperti yang ditetapkan dalam *Woodland v Swimming Teachers Association & Ors* [2014] AC 537 ('Woodland') tidak dipenuhi; dan (v) defendan kedua berhak mendapat indemniti 100% daripada defendan pertama. Isu-isu untuk pertimbangan adalah: (A) sama ada defendan pertama melakukan kecuaian perubatan profesional kepada si mati; (B) sama ada H kecuaian defendan pertama menyumbang secara material kepada kematian si mati; (C) sama ada defendan kedua bertanggungjawab secara vikarius atas kecuaian defendan pertama; (D) sama ada defendan kedua mempunyai kewajipan penjagaan tidak boleh diwakilkan kepada si mati; (E) sama ada defendan kedua bertanggungjawab terhadap harta pusaka si mati atas I pendedahan lewat carta ICU; (F) sama ada keputusan Mahkamah Tinggi mengenai tanggungjawab defendan kedua kepada harta pusaka si mati adalah sah; (G) sama ada perlu ada campur tangan rayuan berhubung dengan award Mahkamah Tinggi dalam ganti rugi; (H) sama ada Mahkamah Tinggi boleh mengenakan faedah pada kadar 8% setahun ke atas ganti rugi am; dan (I) sama

ada Mahkamah Tinggi terkhilaf dalam memutuskan sumbangan defendan pertama terhadap jumlah ganti rugi dan faedah.

Diputuskan, menolak rayuan defendan pertama dan membenarkan sebahagian rayuan defendan kedua:

(1) Defendan pertama telah melanggar kewajipan berjaga-jaganya dalam nasihatnya kepada ibu bapa si mati berhubung pembedahan sinus. Defendan pertama mempunyai motif kewangan untuk menghantar borang permohonan surat jaminan sebelum pertemuannya dengan ibu bapa si mati dan tidak berniat untuk memenuhi kewajipan berjaga-jaganya dari awal lagi. Tambahan pula, defendan pertama mempunyai pengetahuan sebenar terlebih dahulu mengenai diagnosis Dr Raihanah dan diagnosis/cadangan rawatan Dr Meena berhubung jangkitan otak si mati. Dapatan fakta Mahkamah Tinggi bahawa defendan pertama tidak mempunyai kredibiliti disokong apabila borang permohonan surat jaminan defendan pertama disembunyikan daripada ibu bapa si mati semasa pertemuan. Defendan pertama 'tergesa-gesa' untuk menjalankan pembedahan sinus ke atas si mati supaya tidak melepaskan faedah kewangan. Kelakuan defendan pertama yang relevan di bawah s 8(1) Akta Keterangan 1950 ('AK') jelas menunjukkan motif kewangan defendan pertama untuk pelanggaran kewajipan berjaga-jaga defendan pertama (lihat perenggan 32).

(2) Dapatan fakta Mahkamah Tinggi bahawa defendan pertama cuai berhubung pelanggaran kewajipan berjaga-jaganya dalam pengendalian pembedahan sinus jelas tidak salah. Berdasarkan pandangan pakar PW2 dan DW3 ('pandangan pakar bersama'), defendan pertama harus menunggu sekurang-kurangnya 24 jam dari masa pemberian antibiotik Dr Raihanah sebelum pembedahan sinus dapat dilakukan oleh defendan pertama ('pandangan badan doktor am'). Pembedahan sinus telah dijalankan secara cuai oleh defendan pertama tanpa memberi peluang kepada pemberian antibiotik Dr Raihanah untuk berkesan sekurang-kurangnya 24 jam. Beliau sepatutnya berbincang dengan Dr Raihanah dan Dr Meena sebelum meneruskan pembedahan sinus. Selain itu, pandangan pakar bersama tidak dipengaruhi oleh 'hindsight bias' atau 'outcome bias' kerana pengetahuan perubatan tersebut merupakan sebahagian daripada pandangan badan doktor am. DW3 ialah seorang pakar neurologi perunding dan pendapat pakarnya, bersama-sama dengan keterangan pakar PW2, adalah mencukupi untuk membentuk pandangan badan doktor am yang menjadi asas kepada Mahkamah Tinggi untuk memutuskan bahawa defendan pertama telah melanggar kewajipan berjaga-jaganya dengan melakukan pembedahan sinus. Akhir sekali, harta pusaka si mati tidak menyembunyikan sebarang keterangan material di perbicaraan yang boleh mewajarkan penggunaan

A inferens buruk menurut s 114(g) AK terhadap harta pusaka si mati (lihat perenggan 36 & 38–39).

(3) Kecuaian defendan pertama adalah 'punca penyumbang material' kepada kematian si mati. Jika defendan pertama tidak melanggar kewajipan berjaga-jaganya dalam nasihatnya, persetujuan PW1 tidak akan diberikan dan kematian si mati dapat dielakkan. Oleh itu, terdapat kaitan antara cara defendan pertama mendapatkan persetujuan PW1 dan kematian si mati. Pembedahan sinus juga tidak berkaitan dengan jangkitan otak si mati dan tidak dapat menyembuhkan jangkitan otaknya. Kematian si mati dapat dielakkan dengan mudah 'jika tidak kerana' pelanggaran kewajipan berjaga-jaga defendan pertama (lihat perenggan 41–42).

(4) HMT telah melakukan kesilapan undang-undang dalam memutuskan bahawa defendan kedua bertanggungjawab secara vikarius kepada harta pusaka si mati atas kecuaian perubatan profesional defendan pertama. Defendan pertama bukan pekerja mahupun ejen defendan kedua. Oleh itu, defendan kedua tidak boleh bertanggungjawab secara vikarius kepada harta pusaka si mati atas kecuaian defendan pertama. Tambahan pula, defendan pertama bertanggungjawab atas kecuaian perubatan profesionalnya sendiri. Defendan pertama telah bersetuju untuk diinsuranskan oleh syarikat insurans yang boleh diterima oleh defendan kedua yang akan menyediakan pampasan untuk kecuaian defendan pertama (lihat perenggan 44).

(5) Defendan kedua mempunyai kewajipan berkanun positif di bawah s 31(1)(d) Akta Kemudahan dan Perkhidmatan Jagaan Kesihatan Swasta 1998 yang dibaca bersama peraturan 47(1) dan (2)(b) Peraturan-Peraturan Kemudahan dan Perkhidmatan Jagaan Kesihatan Swasta (Hospital Swasta dan Kemudahan Jagaan Kesihatan Swasta lain) 2006 untuk mendapatkan persetujuan PW1 yang 'sah'. Ciri kelima kes Woodland dipenuhi apabila defendan pertama cuai berkenaan dengan kewajipan berkanun defendan kedua dalam pelaksanaan fungsi yang diandaikan oleh defendan kedua dan diwakilkan oleh defendan kedua kepada defendan pertama. Oleh itu, berkenaan dengan kewajipan berkanun defendan kedua, defendan kedua telah melanggar kewajipan berjaga-jaganya yang tidak boleh diwakilkan yang terhutang kepada si mati (lihat perenggan 56).

(6) Pendedahan lewat carta ICU oleh defendan kedua tidak dapat menyokong satu-satunya kausa tindakan harta pusaka si mati terhadap defendan kedua. Tambahan pula, pendedahan lewat defendan kedua tidak menyumbang secara material kepada kematian si mati. Akibatnya, HMT telah melakukan kesilapan jelas campuran undang-undang dan fakta dalam memutuskan bahawa defendan kedua bertanggungjawab

kepada harta pusaka si mati disebabkan oleh pendedahan lewat defendan kedua (lihat perenggan 57).

(7) Keputusan Mahkamah Tinggi yang mendapati defendan kedua bertanggungjawab atas kematian si mati boleh dijustifikasikan semata-mata atas alasan pelanggaran defendan kedua terhadap kewajipan berjaga-jaganya yang tidak boleh diwakilkan yang terhutang kepada si mati (lihat perenggan 58).

(8) Adalah jelas daripada s 7(3) Akta Undang-Undang Sivil 1956 ('AUS') bahawa harta pusaka si mati boleh menuntut untuk faedah harta pusaka si mati 'apa-apa perbelanjaan munasabah yang ditanggung akibat daripada perbuatan salah, pengabaian atau keingkaran' defendan. Tiada apa-apa dalam ss 7 dan 8 AUS yang memperuntukkan bahawa tuntutan untuk ganti rugi khas dalam tuntutan harta pusaka/tanggungan terhad kepada pembayaran yang dibuat oleh penuntut itu sendiri. Si mati telah meninggal dunia disebabkan oleh kecuaian perubatan profesional defendan pertama dan pelanggaran defendan kedua terhadap kewajipan berjaga-jaga yang tidak boleh diwakilkan. Oleh itu, perbelanjaan hospital/perubatan si mati sebanyak RM100,000 merupakan 'perbelanjaan munasabah yang ditanggung akibat daripada perbuatan salah, pengabaian atau keingkaran' defendan. Mahkamah Tinggi telah dengan betulnya menganugerahkan jumlah RM5,000 sebagai perbelanjaan untuk upacara sembahyang kerana jumlah tersebut telah 'ditanggung akibat daripada perbuatan salah, pengabaian atau keingkaran' defendan dan jumlah itu tidak 'terlalu tinggi'. Mahkamah Tinggi adalah wajar untuk menganugerahkan perbelanjaan pengebumian sebanyak RM30,000 menurut proviso (ii) kepada s 7(3) dan s 8(2)(c) AUS dan jumlah tersebut tidak berlebihan. Akhir sekali, harta pusaka si mati tidak boleh mendapatkan semula jumlah RM6,000 sebagai ganti rugi khas untuk kos pemfailan saman penemuan prabicara untuk mendapatkan rekod defendan kedua mengenai si mati kerana tuntutan tersebut tidak dipohon oleh harta pusaka si mati dalam pernyataan tuntutan (lihat perenggan 60 & 62–66).

(9) Jumlah RM100,000 yang dianugerahkan oleh Mahkamah Tinggi untuk kesakitan, penderitaan dan kehilangan kemudahan hidup tidak berlebihan. Tiada merit dalam hujah defendan mengenai penganugerahan Mahkamah Tinggi bagi kehilangan sumbangan sebanyak RM288,000 kerana dokumen telah dikemukakan di perbicaraan bagi menyokong tuntutan kehilangan sumbangan harta pusaka si mati (lihat perenggan 67–68).

(10) Kewujudan keadaan yang memberatkan di pihak defendan pertama menyokong penganugerahan RM350,000 sebagai ganti rugi teruk. Jumlah RM350,000 sebagai ganti rugi teruk tidak akan memperkaya secara tidak adil atau memberi pampasan berlebihan kepada harta pusaka

si mati; atau tidak akan memusnahkan defendan pertama dari segi kewangan secara tidak adil. Walau bagaimanapun, HMT telah terkhilaf menggunakan budi bicaranya dalam menganugerahkan ganti rugi teruk sebanyak RM350,000 terhadap defendan kedua kerana tidak terdapat keadaan yang memberatkan di pihak defendan kedua yang boleh menyokong, apatah lagi mewajarkan, penganugerahan tersebut. Oleh itu, penganugerahan ganti rugi teruk terhadap defendan kedua diketepikan (lihat perenggan 73, 75 & 77).

(11) Mahkamah Tinggi telah mengenakan kadar faedah yang terlalu tinggi ke atas ganti rugi am yang akan memperkaya harta pusaka si mati secara tidak adil. Akibatnya, kadar faedah ke atas ganti rugi am dikurangkan daripada 8% setahun kepada 5% setahun (lihat perenggan 78).

(12) Rayuan defendan kedua berkenaan dengan sumbangan 80% defendan pertama dibenarkan. Defendan pertama bertanggungjawab 100% atas liabiliti defendan kedua kepada harta pusaka si mati. Adalah 'adil dan saksama' di bawah s 10(1)(c) dan (2) AS untuk defendan pertama menanggung rugi 100% liabiliti defendan kedua kepada harta pusaka si mati kerana defendan kedua bukan pihak atau mengambil bahagian representasi salah defendan pertama kepada ibu bapa si mati; dan keputusan untuk melakukan pembedahan sinus dibuat semata-mata oleh defendan pertama. Oleh itu, defendan pertama hendaklah menanggung rugi defendan kedua sepenuhnya (lihat perenggan 82 & 84).

(13) Berkenaan dengan kos yang dianugerahkan di Mahkamah Tinggi, tiada kesilapan undang-undang dan/atau fakta dalam pelaksanaan budi bicara oleh HMT untuk mengenakan jumlah RM250,000 sebagai kos penyediaan guaman terhadap defendan pertama. Walau bagaimanapun, jumlah RM75,000 sebagai kos penyediaan guaman yang dianugerahkan terhadap defendan kedua harus dikurangkan kerana Mahkamah Tinggi telah terkhilaf kerana defendan kedua tidak bertanggungjawab secara vikarius kepada harta pusaka si mati atas kecuaian perubatan profesional defendan pertama dan ganti rugi teruk sebanyak RM350,000 tidak sepatutnya dianugerahkan terhadap defendan kedua. Jumlah kos penyediaan guaman terhadap defendan kedua harus dikurangkan kepada RM50,000. Bagi kos kedua-dua rayuan ini: (a) kos rayuan defendan pertama berjumlah RM70,000 hendaklah dibayar oleh defendan pertama kepada harta pusaka si mati; dan (b) harta pusaka si mati hanya berhak kepada sebahagian daripada kos rayuan defendan kedua kerana defendan kedua hanya bertanggungjawab kepada harta pusaka si mati atas pelanggaran kewajipan berjaga-jaga yang tidak boleh diwakilkan kepada si mati (lihat perenggan 85–86).

Cases referred to

Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia Tenaga Nasional Bhd [2015] 5 MLJ 52, CA (refd)

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582, QBD (refd)

Bolitho v City and Hackney Health Authority [1997] 3 WLR 1151, HL (refd)

BXB v Trustees of the Barry Congregation of Jehovah's Witnesses and another [2023] 3 All ER 1, SC (refd)

Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors [2019] 8 MLJ 331; [2019] 1 CLJ 626, HC (refd)

Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281, FC (refd)

Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685, FC (refd)

Dr Neville ak Michael Gomis v Mahkota Medical Centre Sdn Bhd & Ors (unreported), HC (refd)

Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593, FC (refd)

Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (refd)

Hii Chii Kok v Ooi Peng Jin London Lucien and another [2017] 2 SLR 492, CA (refd)

Hughes v Rattan [2023] 1 All ER 300; [2022] EWCA Civ 107, CA (refd)

Koh Sin Chong Freddie v Chan Cheng Wah Bernard and others and another appeal [2013] 4 SLR 629, CA (refd)

Montgomery v Lanarkshire Health Board (General Medical Council intervening) [2015] 2 All ER 1031, SC (folld)

Motordata Research Consortium Sdn Bhd v Ahmad Shahril bin Abdullah & Ors [2017] MLJU 1187; [2017] 7 AMR 560, HC (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)

Navin Sharma a/l Karam Chand (menyaman sebagai pentadbir harta pusaka Suman Rampal a/p Hardyal Rampal, simati) & Anor v Bukit Tinggi Hospital Sdn Bhd & Anor [2023] MLJU 2370, HC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)

Pang Ah Chee v Chong Kwee Sang [1985] 1 MLJ 153, FC (refd)

Pantai Medical Centre Sdn Bhd v Fareed Reezal bin Arund (suing through his wife and litigation representative Wan Zafura bt Wan Kassim) and another appeal [2022] 4 MLJ 529, CA (refd)

Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd [1986] 2 MLJ 30, SC (refd)

Qi Qiaoxian (claiming as the mother and dependent of Qi Xiangqing, deceased) & Anor v Sunway Putra Hotel Sdn Bhd [2024] MLJU 732; [2024] 5 CLJ 734, CA (refd)

Rookes v Barnard [1964] 1 All ER 367, HL (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)
Siow Ching Yee (suing through his wife and litigation representative, Chau Wai Kin) v Columbia Asia Sdn Bhd [2024] 3 MLJ 66, FC (distd)
Tan Sri Datuk Seri Mohd Hussein bin Abd Hamid v Gleneagles Hospital (Kuala Lumpur) Sdn Bhd & Anor [2024] MLJU 3690, CA (distd)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)
Tropicana Golf & Country Resort Bhd v Loke Wei Kuen & Anor and other cases [2022] MLJU 1969; [2023] 2 MLRH 453, HC (refd)
Vincent Manickam s/o David (suing by himself and as administrator of the estate of Catherine Jeya Sellamah, deceased) & Ors v Dr S Hari Rajah & Anor [2018] 2 MLJ 497, CA (refd)
Woodland v Swimming Teachers Association and others [2014] AC 537, CA (refd)
Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1, FC (refd)
Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors [2017] 5 MLJ 438, FC (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 7(3), (3)(i), (3)(ii), (3)(iv), (3)(iv)(a), (3)(iv)(b), (3)(iv)(c), (3)(iv)(d), 8, 8(2)(a), 8(2)(c), 10(1), (1)(c), (2), 11
Courts of Judicature Act 1964 s 70
Evidence Act 1950 ss 8(1), 57(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), (1)(h), (1)(i), (1)(j), (1)(k), (1)(l), (1)(m), (1)(n), (1)(o), 114(g)
Penal Code ss 192, 193
Private Healthcare Facilities and Services (Private Hospitals and other Private Healthcare Facilities) Regulations 2006 reg 47(1), (2)(b), (3)
Private Healthcare Facilities and Services Act 1998 ss 2, 31(1)(d)
Rules of Court 2012 O 40A r 2, 2(1), 2(2), O 42 r 12
Rules of the Court of Appeal 1994 rr 18(1), (2), 21(1), 54, 96

Appeal from: *Gan Hong Heng (suing as the administrator of the estate of Gan Hong Wee, deceased) v Dr Chandran a/l Gnanappah & Anor* [2023] MLJU 1662 (High Court, Shah Alam)

Raja Eileen Soraya bt Raja Aman (with Michelle Khor and Amanda Sena) (Raja, Darryl & Loh) in Civil Appeal No B-02(NCvC)(W)-263–02 of 2023 for the appellant.
Raja Eileen Soraya bt Raja Aman (with Michelle Khor and Amanda Sena) (Raja, Darryl & Loh) in Civil Appeal No B-02(NCvC)(W)-231–02 of 2023 for the second respondent.
Felix Raj (with Ahmad Aizek Busu) (Felix Raj Chambers) in Civil Appeal No B-02(NCvC)(W)-231–02 of 2023 for the appellant.

Manmohan Singh Dhillon (with Karthi Kanthabalan and Desmond Mun) (PS Ranjan & Co) in Civil Appeal No B-02(NCvC)(W)-263–02 of 2023 for the first respondent.
Manmohan Singh Dhillon (with Karthi Kanthabalan and Desmond Mun) (PS Ranjan & Co) in Civil Appeal No B-02(NCvC)(W)-231–02 of 2023 for the first respondent.
Felix Raj (with Ahmad Aizek Busu) (Felix Raj Chambers) in Civil Appeal No B-02(NCvC)(W)-263–02 of 2023 for the second respondent.

Wong Kian Kheong JCA (delivering judgment of the court):

A. INTRODUCTION

[1] This judgment discusses, among others, the 4–1 majority judgment of the Federal Court delivered by Mary Lim Thiam Suan FCJ in *Siow Ching Yee (suing through his wife and litigation representative, Chau Wai Kin) v Columbia Asia Sdn Bhd* [2024] 3 MLJ 66 ('majority judgment (*Siow Ching Yee*)') regarding the effect of the Private Healthcare Facilities and Services Act 1998 ('the PHFSA') and Private Healthcare Facilities and Services (Private Hospitals and other Private Healthcare Facilities) Regulations 2006 ('the PHFSR') on the question of whether a 'private hospitaf' (defined in s 2 of the PHFSA) owed a non-delegable duty of care to the private hospital's patients (notwithstanding the fact that the patients were only treated by medical consultants at the private hospital who were its independent contractors and not its employees or agents).

[2] A draft of this judgment ('draft') had been forwarded to Supang Lian and Faizah bt Jamaludin JJCA. Both my learned sisters had expressed their concurrence with the draft.

B. BACKGROUND

[3] These two appeals ('two appeals') were heard together by us because the two appeals emanated from the same trial in the High Court ('trial').

[4] We shall refer to the parties as they were in the High Court.

[5] The second defendant ('second defendant') owns and manages a private hospital of the same name ('Hospital').

[6] By virtue of a consultancy agreement dated 26 September 2012 ('CA'), the first defendant ('first defendant') was an independent contractor of the second defendant and carried out his medical practice as a Ear, Nose and Throat ('ENT') Consultant in the Hospital at the material time.

[7] Mr Gan Hong Heng, the brother of the deceased person, Mr Gan Hong Wee ('deceased'), was initially the administrator of the deceased's estate ('first administrator (deceased's estate)'). Before we could deliver our decision for these two appeals on 10 February 2025, unfortunately, the first administrator (deceased's estate) passed away on 23 January 2025. The deceased's estate then obtained an order of the Court of Appeal on 30 April 2025 for Ms Gan See Joe, the deceased's niece, to be the first respondent in these two appeals.

[8] On 27 March 2014:

(1) at about 11am, the deceased was brought to the Hospital's Accident and Emergency Department by the first administrator (deceased's estate) and the deceased's mother, Madam Ng Geok Hoon ('Madam Ng');

(2) according to the first administrator (deceased's estate):

(a) for the past two days:

(i) there was confused behavior on the part of the deceased; and

(ii) the deceased had right lower limb weakness for the past two days.

(b) on 26 March 2014:

(i) the deceased suffered blurred vision in both of his eyes;

(ii) the deceased vomited blood; and

(iii) the deceased had an episode of fits.

(3) the deceased was admitted to the Hospital and was attended to by Dr Kalaiselvan a/l Munisamy ('Dr Kalaiselvan');

(4) Dr Kalaiselvan:

(a) sent the deceased for a CT (computed topography) scan of his brain; and

(b) took the deceased's blood samples.

(5) the CT scan of the deceased's brain showed that all his sinuses were almost completely filled with retained secretions. Consequently, Dr Kalaiselvan referred the deceased to Datuk Dr Raihanah bt Abdul Khalid, a consultant neurologist ('Dr Raihanah');

(6) at about 6pm, Dr Raihanah physically examined the deceased ('first examination (Dr Raihanah)'). Based on the blood test of the deceased and the first examination (Dr Raihanah):

(a) the deceased was completely blind in both eyes; and

(b) Dr Raihanah diagnosed him with pansinusitis (infection of all the four paranasal sinuses in the head) with possible meningitis

(infection of the meninges (the tissue surrounding the lining of the brain)), optic neuritis (inflammation of optic nerves) and seizures ('Dr Raihanah's diagnosis (27 March 2014)').

Dr Raihanah then administered three types of intravenous antibiotics to the deceased ('Dr Raihanah's antibiotics administration (27 March 2014)');

(7) a contrast CT scan was conducted on the deceased at about 8.25pm and confirmed that there was severe sinusitis involving all the four paranasal sinuses of the deceased. Dr Raihanah then referred the deceased to the first defendant (who was the on-call ENT consultant at the material time);

(8) at about 9.15pm, the first defendant examined the deceased without the presence of the deceased's family members ('first examination (first defendant)'). The first defendant:

(a) noted that the deceased was confused and could not think clearly;

(b) referred the deceased to Dr Meena Sivanantharajah ('Dr Meena'), an ophthalmologist (eye specialist) who was on call at the material time; and

(c) filled in and signed a 'Guarantee Letter Request Form' to the deceased's insurer ('first defendant's guarantee letter request form (9.15pm, 27 March 2014)'). In the first defendant's guarantee letter request form (9.15pm, 27 March 2014), among others:

(i) in para 38, the first defendant stated that a 'FESS', namely 'Functional Endoscopic Sinus Surger' ('sinus surgery'), had to be performed on the deceased;

(ii) para 39 stated as follows:

> *I [first defendant] hereby certify that I have personally examined and treated the [deceased] for his/her injuries/illness described above and that the facts as stated above represent my medical opinion of his/her condition.*

(Emphasis added.); and

(iii) the first defendant himself filled in the date '27/3/14' in his own handwriting;

(9) Dr Meena examined the deceased at about 10.15pm and diagnosed as follows:

(a) the deceased had a sudden loss of vision prior to his admission to the Hospital; and

(b) the deceased was diagnosed with pansinusitis with meningeal spread causing bilateral optic neuritis.

(10) Dr Meena met the deceased's family members and explained to them her diagnosis and proposed treatment ('Dr Meena's diagnosis/proposed treatment (10.15pm, 27 March 2014)'):

(a) Dr Meena wanted to start the deceased with steroids (to treat the optic neuritis) (Dr Meena's proposed steriods treatment) but the Dr Meena's proposed steriods treatment had to wait for 48 hours because Dr Raihanah's antibiotics administration (27 March 2014) could only take effect after 48 hours from the time of Dr Raihanah's antibiotics administration (27 March 2014); and

(b) although the deceased was given extensive medical treatment, there was still a risk of permanent visual loss.

[9] On 28 March 2014:

(1) at 7.50am, the first defendant examined the deceased and found him to be in the same general condition as the first examination (first defendant);

(2) Dr Raihanah examined the deceased at 9.30am ('second examination (Dr Raihanah)') and found him to be in the same general condition as the first examination (Dr Raihanah). During the second examination (Dr Raihanah):

(a) a portable electroencephalogram procedure ('EEG') of the deceased was undertaken; and

(b) it was discovered that the deceased's right hand was twitching. Hence, Dr Raihanah ordered anti-seizure medication to be administered to the deceased.

(3) at about 10.10am, the first defendant examined the deceased a third time ('third examination (first defendant)'). The third examination (first defendant) did not show any improvement on the part of the deceased. Hence, the first defendant requested to meet the deceased's family so as to discuss the next possible steps to treat the deceased. The first defendant met the deceased's parents, namely, Mr Gan Ah Tee ('PW1') and Madam Ng, in the presence of the deceased ('meeting (first defendant-deceased's parents (28 March 2014))'). At the meeting (first defendant-deceased's parents (28 March 2014)), the first defendant alleged that he had advised the deceased's parents, among others, as follows:

(a) the results of the deceased's CT brain scan showed that he was suffering from severe pansinusitis which affected his brain;

(b) 'based on the investigation results, the [deceased's] sinuses were the probable cause and site from where the infection started' —

answer to question No 15 of the first defendant's witness statement ('WS (first defendant)');

(c) it was necessary to conduct the sinus surgery later on that day itself (28 March 2014) 'to help to reverse the [deceased's] disease' and to obtain samples and culture material from the deceased's sinuses for examination — answer to question No 16 WS (first defendant); and

(d) the deceased's family 'could choose to continue with intravenous antibiotics' — answer to question No 16 WS (first defendant).

The above evidence by the first defendant was denied by PW1 who was present at the meeting (first defendant-deceased's parents (28 March 2014). According to PW1, among others:

(i) the first defendant advised the deceased's parents that the deceased would recover once the pus was extracted by way of the sinus surgery; and

(ii) PW1 suggested a prescription of medicine before doing the sinus surgery but this suggestion was declined by the first defendant on the ground that the sinus surgery was only a 'minor' operation.

(4) PW1 gave consent for the sinus surgery ('PW1's consent (sinus surgery)');

(5) the first defendant did not inform the deceased's parents:

(a) Dr Raihanah's antibiotics administration (27 March 2014) could only take effect between 24 and 48 hours from the time of the antibiotics administration (27 March 2014). In other words, there was an alternative to the sinus surgery, namely, to wait for 48 hours for the outcome of Dr Raihanah's antibiotics administration (27 March 2014);

(b) the sinus surgery was conducted with general anesthesia ('GA'). The GA made it difficult for Dr Raihanah's antibiotics administration (27 March 2014) to take effect; and

(c) the sinus surgery was unrelated to the deceased's brain infection and could not cure the deceased's brain infection. The sinus surgery was therefore not an emergency operation but purely an elective one.

(6) Dr Meena examined the deceased at about 10.45am ('second examination (Dr Meena)'). After the second examination (Dr Meena), Dr Meena ordered a 'MRI' (Magnetic Resonance Imaging) scan of the deceased's head at 12pm ('proposed MRI scan (12pm, 28 March 2014)'). The proposed MRI scan (12pm, 28 March 2014) did not

proceed because of the sinus surgery which was subsequently performed by the first defendant on that day;

(7) at about 2.50pm, the first defendant performed the sinus surgery on the deceased with the assistance of Dr Ong Keh Aun, the consultant anesthetist; and

(8) after the sinus surgery:

(a) the deceased was immediately restless and delirious. Hence, he was intubated and put on a ventilation machine (to support his breathing);

(b) the deceased was transferred to the Hospital's Intensive Care Unit ('ICU') at about 6pm on that day; and

(c) the deceased did not regain consciousness.

[10] On 7 April 2014:

(1) due to financial constraint of the deceased's family (the deceased's insurance coverage had been fully utilised at the Hospital), the deceased's family transferred the deceased to a public hospital, 'Hospital Kuala Lumpur' ('HKL');

(2) Madam Ng signed the 'Discharge Against Medical Advice' form which stated that she transferred the deceased from the Hospital at her 'own risk and against the medical advice' of Dr Raihanah ('Madam Ng's discharge form');

(3) the deceased was transferred from the Hospital to HKL; and

(4) a MRI brain scan of the deceased was conducted and the scan showed encephalitis (inflammation of the whole brain tissue which was caused by an infection).

[11] A second MRI brain scan of the deceased was carried out in HKL on 18 April 2014. According to this MRI brain scan, the deceased had severe meningoencephalitis (both the meninges and the bulk of the brain were infected).

[12] The deceased passed away in HKL on 30 April 2014. The cause of the deceased's death was encephalitis of unknown etiology (the cause of the encephalitis was unknown).

C. PROCEEDINGS IN THE HIGH COURT

[13] On 4 October 2016, the first administrator (deceased's estate) filed an application in the High Court ('pre-trial discovery suit') against, among others,

the second defendant, for a pre-trial discovery order to compel the second defendant to disclose to the first administrator (deceased's estate) all the reports, records and documents of the second defendant regarding the deceased ('second defendant's records (deceased)').

[14] The pre-trial discovery suit was discontinued against the second defendant after the second defendant had voluntarily disclosed the second defendant's records (deceased) to the first administrator (deceased's estate) in 2016.

[15] On 18 April 2017, the first administrator (deceased's estate) filed a suit ('this suit') against the first and second defendants (referred collectively in this judgment as the ('defendants').

[16] In this suit:

(1) the second defendant applied for an indemnity or contribution from the first defendant in the event that the second defendant was liable to the deceased's estate ('second defendant's indemnity/contribution claim (first defendant)'); and

(2) the following witnesses testified at the trial:

(a) in support of this suit:

(i) PW1;

(ii) Dato' Dr Gurdeep Singh a/l B Mahinder Singh ('PW2'), a consultant ENT, gave an expert opinion at the trial;

(iii) the first administrator (deceased's estate);

(iv) Mr Wong Soek Fong ('PW4') who testified regarding the quantum of the deceased estate's claim; and

(v) Mr Gan Hong Tuck ('PW5'), the deceased's elder brother.

(b) the first defendant gave evidence under oath and called the following expert witnesses to resist this suit:

(i) Prof Dato' Dr Balwant Singh Gendeh ('DW2'), an ENT expert; and

(ii) Dr Sng Kim Hock ('DW3'), a consultant neurologist.

(c) Dr Lourdes Dava Raja a/l Durai Raj ('DW4'), the second defendant's Chief Medical Services Officer, testified on behalf of the second defendant.

[17] During the trial:

(1) the solicitors for the deceased's estate discovered that the second defendant had not given to the deceased's estate eleven pages of a chart regarding the deceased's admission into the ICU ('ICU chart'); and

(2) after the solicitors of the deceased's estate had notified the second defendant's solicitors regarding the non-disclosure of the ICU chart:

(a) the second defendant's solicitors immediately cause a search for the ICU chart; and

(b) after obtaining the ICU chart, the second defendant's solicitors served it on all the other parties in this suit.

DW4 testified at the trial that the second defendant's failure to disclose the ICU chart was due to sheer inadvertence and nothing more.

[18] After the trial, the learned High Court judge made the following decision:

(1) both the defendants were liable to the deceased's estate in this case;

(2) the following award of damages was made ('High Court's award (damages)'):

(a) a total amount of RM143,000 was granted as special damages ('special damages');

(b) general damages in a total sum of RM398,000 was awarded ('general damages'); and

(c) an amount of RM350,000 was ordered as aggravated damages ('aggravated damages').

(3) costs were awarded as follows:

(a) a sum of RM250,000 was ordered as getting up ('GU') against the first defendant;

(b) the second defendant shall be liable to the deceased's estate for an amount of RM75,000 as GU; and

(c) both the defendants shall share equally a total sum of RM25,686.44 for the out of pocket expenses.

(4) the defendants shall pay to the deceased's estate interest on the High Court's award (damages) as follows:

(a) interest at the rate of 4%pa on the special damages from 30 April 2014 (date of the deceased's death) until 19 January 2013 (date of the High Court's decision);

(b) interest at the rate of 8%pa on the general damages from 21 April

2017 (date of service of the writ in this case) until 19 January 2013; and

(c) interest at the rate of 5%pa on the judgment sum (including costs) from 19 January 2013 until full payment of the same.

(5) with regard to the second defendant's indemnity/contribution claim (first defendant):

(a) the second defendant was entitled to claim from the first defendant 80% contribution of the total damages and interest awarded by the High Court against the second defendant ('first defendant's 80% contribution (second defendant's liability)'); and

(b) the first defendant shall pay to the second defendant interest at the rate of 5%pa on the first defendant's 80% contribution (second defendant's liability).
('High Court's decision').

[19] The High Court's 'Grounds of Judgment' ('GOJ') stated as follows, among others:

(1) with regard to the first defendant:

(a) the learned High Court judge did not find the first defendant to be a credible witness — paras 33 to 41 GOJ;

(b) according to paras 41 to 43 GOJ, the first defendant had given evidence which was not pleaded in his defence; and

(c) in para 44 GOJ, the High Court found as a fact that the first defendant had failed to give correct information and advice pertaining to:

(i) the purpose of the sinus surgery;

(ii) the risks and benefits of the sinus surgery; and

(iii) the alternative treatment option.

(2) in respect of the second defendant:

(a) the second defendant owed a non-delegable duty of care to the deceased — paras 45 to 47, 57 and 58 GOJ;

(b) in para 59 GOJ, the learned High Court judge decided that the second defendant was vicariously liable for the first defendant's professional medical negligence; and

(c) according to para 60 GOJ, the second defendant was 'directly liable' to the deceased's estate because the second defendant had failed to disclose the ICU chart to the deceased's estate.

(3) both the defendants:

(a) had failed to obtained informed consent for the sinus surgery — para 48 GOJ;

(b) should not have undertaken the sinus surgery — paras 49 to 54 GOJ; and

(c) are liable to the deceased's estate for the deceased's death — para 61 GOJ.

(4) the sinus surgery had materially contributed to the death of the deceased — paras 55 and 56 GOJ;

(5) in paras 62 to 69 GOJ, the High Court gave reasons for the award of special damages;

(6) the learned High Court judge explained how the general damages were computed in paras 70 to 74 GOJ;

(7) aggravated damages were awarded against the defendants for to their 'contumelious' conduct — paras 75 and 76 GOJ; and

(8) the reasons for the first defendant's 80% contribution (second defendant's liability) were stated in para 78 GOJ.

D. TWO APPEALS

[20] The first defendant had appealed to the Court of Appeal against the High Court's decision in Civil Appeal No B-02(NCvC)(W)-263–02 of 2023 ('first defendant's appeal'). Civil Appeal No B-02(NCvC)(W)-231–02 of 2023 had been filed by the second defendant in the Court of Appeal against the High Court's decision ('second defendant's appeal').

E. CONTENTIONS OF THE PARTIES

[21] The first defendant's learned lead counsel, YM Raja Eileen Soraya bt Raja Aman, had advanced, among others, the following submission in support of the first defendant's appeal:

(1) there was no link between the manner in which the first defendant had obtained PWTs consent (sinus surgery) and the death of the deceased;

(2) the High Court's finding of fact that the first defendant was negligent in carrying out the sinus surgery ('High Court's factual finding (first defendant's negligence)') was 'plainly wrong' because:

(a) the learned High Court judge had failed to consider the seriousness of the deceased's medical problems when he presented himself in the Hospital on 27 March 2014 (as evidenced by the

deceased's blood test, CT scan results, EEG scan result, diagnoses of Dr Raihanah and Dr Meena);

(b) the High Court had 'misunderstood' the expert testimonies of PW2 and DW3 which were given with the benefit of hindsight. The expert opinions of PW2 and DW3 did not state that the sinus surgery should not have been carried out by the first defendant on 28 March 2014. Reliance had been placed on the judgment of Sundaresh Menon CJ in Singapore's Court of Appeal (its apex court) in *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] 2 SLR 492;

(c) all the three independent medical experts, ie, PW2, DW2 and DW3, had reached a 'consensus' that it was reasonable for the first defendant to think that pansinusitis was a possible source of meningoencephalitis (the cause of the death of the deceased); and

(d) the sinus surgery was the only way to:

(i) drain the mucus from the deceased's sinuses (which might improve his medical condition); and

(ii) obtain a sample from the deceased so as to identify the virus, bacteria or fungus which had caused his infection.

(3) there was no evidence to prove that the sinus surgery had materially contributed to the deceased's death. In this regard, DW3 gave an expert opinion that the deceased had a 'very nasty' brain infection which deteriorated very fast within 24 hours. Such an expert view should have been accepted by the learned High Court judge as DW3 was the only independent neurologist who gave expert evidence at the trial. The deceased's estate did not call any independent neurologist to testify in this case;

(4) premised on the majority judgment (*Siow Ching Yee*), the second defendant owed a non-delegable duty of care to the deceased and upon the breach of such a duty, the second defendant cannot claim any indemnity or contribution from the first defendant; and

(5) the High Court had erred in awarding the following sums of damages:

(a) with regard to special damages:

(i) the sum of RM100,000 for the deceased's hospital and medical fees ('deceased's hospital/medical expenses') should be set aside because in any event, the deceased would have required medical treatment for his serious condition;

(ii) the amount of RM5,000 paid by PW1 as expenses to hold a Taoist prayer ceremony (to pray for the deceased's recovery) ('expenses

(prayer ceremony)') should not have been awarded because:
(ii)(a) there was no document to support the expenses (prayer ceremony); and
(ii)(b) this sum was not paid by the first administrator (deceased's estate) but by PW1.

(iii) the amount of RM30,000 for the deceased's funeral expenses ('funeral expenses') was objected to by the first defendant on the same two grounds which had been raised against the award of the expenses (prayer ceremony).

(b) in respect of general damages:

(i) a sum of RM100,000 for 'pain, suffering and loss of amenities' was manifestly excessive and was not in line with the current trend of awards for pain, suffering and loss of amenities. The first defendant's learned lead counsel proposed a sum of RM20,000 for pain and suffering; and

(ii) the learned High Court judge awarded 'loss of contribution' from the deceased to his parents at the rate of RM2,000 per month for 12 years. The first defendant disputed such an amount on the following two grounds:
(ii)(a) the signatures on the documents tendered in support of the loss of contribution were not the same; and
(ii)(b) there was no evidence that the deceased had actually received income from Eve Marketing (KL) Sdn Bhd and E-Feng Sheng Marketing Sdn Bhd ('two companies').

(c) the first defendant had objected to the aggravated damages of RM350,000. According to the first defendant's learned lead counsel:

(i) the High Court should not have awarded the aggravated damages in an estate and dependency claim ('estate/dependency claim') under ss 7 and 8 of the Civil Law Act 1956 ('the CLA');

(ii) the purpose of aggravated damages is to compensate the deceased personally (not the deceased's family) for any 'added distress' caused by an 'aggravating' conduct of the defendants; and

(iii) the aggravated damages was 3.5 times the sum of pain and suffering (RM100,000). The first defendant's learned lead counsel cited the judgment of Chao Hick Tin JA in the Court of Appeal of Singapore in *Koh Sin Chong Freddie v Chan Cheng Wah Bernard and others and another appeal* [2013] 4 SLR 629.

[22] In respect of the second defendant's appeal, the second defendant's learned lead counsel, Mr Felix Raj, had submitted as follows:

(1) the first defendant was only an independent contractor and not an employee of the second defendant. Accordingly, the second defendant could not be vicariously liable to the deceased's estate for the first defendant's professional medical negligence in this case;

(2) the late disclosure of the ICU chart by the second defendant to the first administrator (deceased's estate) ('second defendant's late disclosure (ICU chart)'):

(a) did not prejudice the claim of the deceased's estate in this case; and

(b) did not materially contribute to the death of the deceased (which was materially contributed to by the sinus surgery after the admission of the deceased to the ICU).

(3) the first defendant (not the second defendant) had a duty of care to:

(a) give proper advice to the deceased's parents regarding the deceased's proposed treatment in the form of the sinus surgery; and

(b) ensure that PWTs consent regarding the sinus surgery was an informed one.

(4) the second defendant did not owe a non-delegable duty of care to the deceased because the fifth 'feature' for the imposition of a non-delegable duty of care as laid down by Lord Sumption JCS in the Supreme Court of UK in *Woodland v Swimming Teachers Association and others* [2014] AC 537, had not been fulfilled in this case, namely, the second defendant did not have the function of advising the deceased's parents regarding the sinus surgery and to obtain an informed consent from them;

(5) even if the second defendant owed a non-delegable duty of care to the deceased with regard to:

(a) the first defendant's advice to the deceased's parents in respect of the sinus surgery; and

(b) the first defendant's duty to obtain informed consent from the deceased's parents regarding the sinus surgery,
– the second defendant had not breached this non-delegable duty of care to the deceased.

(6) with regard to the High Court's award (damages):

(a) the following items of special damages were disputed by the second defendant:

(i) the expenses (prayer ceremony) is not recognised in law as a form of special damages;

(ii) the sum of RM30,000 for the funeral expenses should be reduced to RM5,000; and

(iii) the amount of RM6,000 ('costs (pre-trial discovery suit)') awarded by the learned High Court judge as costs incurred by the deceased's estate for the filing of the pre-trial discovery suit (to obtain the second defendant's records (deceased)) should be set aside because this was not claimed for in the statement of claim of the deceased's estate ('SOC').

(b) in respect of general damages, the second defendant contended that the loss of contribution should not be awarded at all due to a lack of documentary evidence in support of such an award; and

(c) according to the second defendant, the award of aggravated damages should be set aside because the requirements laid down by Lord Devlin in the House of Lords in *Rookes v Barnard* [1964] 1 All ER 367, at pp 410 to 411, had not been complied with;

(7) interest of 8%pa on the general damages should be reduced to 5%pa;

(8) the sum of RM75,000 (as determined by the learned High Court judge to be the GU payable by the second defendant to the deceased's estate for the proceedings in the High Court) was excessive and should be reduced to RM50,000. However, if the second defendant's appeal is allowed by this court, the second defendant prayed for the following amounts of costs to be paid by the deceased's estate to the second defendant:

(a) RM65,000 as costs for the proceedings in the High Court; and

(b) costs in a sum of RM50,000 for the second defendant's appeal.

(9) based on the CA, if:

(a) the first defendant was liable for professional medical negligence to the deceased; and

(b) the second defendant had breached a non-delegable duty of care owed to the deceased,

– the second defendant was entitled to a 100% indemnity from the first defendant.

[23] In praying for this court to dismiss the two appeals with costs, Mr Manmohan Singh Dhillon, the learned lead counsel for the deceased's estate, had contended as follows, among others:

(1) the learned High Court judge had the audio-visual advantage of listening to the witnesses and assessing their demeanour. The High Court had made a finding of fact that the first defendant was not a credible witness ('High Court's factual finding (first defendant's lack of credibility)');

(2) the High Court's factual finding (first defendant's lack of credibility) and High Court's factual finding (first defendant's negligence) were not 'plainly erroneous' so as to warrant appellate intervention;

(3) the first defendant failed to advise the deceased's parents at the meeting (first defendant-deceased's parents (28 March 2014) that:

(a) there was a risk that the deceased's medical problems would worsen after undergoing the sinus surgery; and

(b) there was an alternative to the sinus surgery, namely to wait between 24 and 48 hours from the time of Dr Raihanah's antibiotics administration (27 March 2014) for the outcome of Dr Raihanah's antibiotics administration (27 March 2014).

(4) the first defendant's professional medical negligence was a material contribution to the death of the deceased in this case;

(5) the second defendant was liable to the deceased's estate due to the following reasons:

(a) according to the majority judgment (*Siow Ching Yee*) and Raus Sharif CJ's decision in the Federal Court in *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281, the second defendant owed a non-delegable duty of care to the deceased and such a non-delegable duty of care had been breached by the second defendant;

(b) the majority judgment (*Siow Ching Yee*) had 'questioned' the correctness of the Federal Court's judgment delivered by Raus Sharif CJ in *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; and

(c) the second defendant had breached s 31(1)(d) of the PHFSA read with reg 47(1) and (2)(b) of the PHFSR regarding PW1's consent (sinus surgery).

(6) the second defendant was vicariously liable to the deceased's estate for the first defendant's professional medical negligence in this case. Reliance had been placed on the following three cases:

(a) the judgment of the Court of Appeal delivered by Mary Lim Thiam Suan JCA (as she then was) in *Vincent Manickam s/o David (suing by himself and as administrator of the estate of Catherine Jeya Sellamah, deceased) & Ors v Dr S Hari Rajah & Anor* [2018] 2 MLJ 497;

(b) Lord Burrows JSC's decision in the Supreme Court of the United Kingdom (UK) in *BXB v Trustees of the Barry Congregation of*

Jehovah's Witnesses and another [2023] 3 All ER 1; and

(c) the unreported judgment of the High Court in *Dr Neville ak Michael Gomis v Mahkota Medical Centre Sdn Bhd & Ors* (unreported).

(7) with regard to the High Court's award (damages), the defendants had failed to show that the High Court's award (damages) was so extremely high so as to warrant appellate intervention.

F ISSUES

[24] The following questions arose in these two appeals:

(1) whether the High Court's factual finding (first defendant's negligence) and High Court's factual finding (first defendant's lack of credibility) were plainly wrong. In this regard:

(a) did the first defendant breach his duty of care when the first defendant failed to inform the deceased's parents at the meeting (first defendant-deceased's parents (28 March 2014)):

(i) of the material risks involved in the sinus surgery proposed by the first defendant; and

(ii) that there was a reasonable alternative to the sinus surgery, namely, to wait for the outcome of Dr Raihanah's antibiotics administration (27 March 2014).

(b) what was the view of the general body of doctors regarding the diagnosis and treatment for the deceased at the material time ('view of General Body of Doctors (deceased's diagnosis/treatment)');

(c) could the view of General Body of Doctors (deceased's diagnosis/treatment) withstand logical analysis?

(d) if the view of General Body of Doctors (deceased's diagnosis/treatment) could withstand logical analysis, whether the first defendant had acted in accordance with the view of General Body of Doctors (deceased's diagnosis/treatment) by conducting the sinus surgery in this case; and

(e) did the learned High Court judge commit a plain factual error in not considering the fact that the expert opinions of PW2 and DW3 could have been influenced by 'hindsight bias' or 'outcome bias'?

(2) whether the first defendant's professional medical negligence in this case had materially contributed to the death of the deceased;

(3) with regard to the second defendant:

(a) in view of the CA and the fact that the first defendant was not the second defendant's employee or agent, could the second defendant be vicariously liable for the first defendant's professional medical negligence?

(b) whether the second defendant owed a non-delegable duty of care to the deceased:

(i) pursuant to s 31(1)(d) of the PHFSA read with reg 47(1) and (2)(b) of the PHFSR;

(ii) according to the 'five features test' laid down by UK's Supreme Court in *Woodland* ('five features test (*Woodland*)') and applied by our Federal Court in *Dr Kok Choong Seng*, *Dr Hari Krishnan* and the majority judgment (*Siow Ching Yee*); and

(iii) which was 'fair, just and reasonable' in the circumstances of this case.

If the second defendant owed a non-delegable duty of care to the deceased in this case, had the second defendant breached this non-delegable duty of care?

(4) could the second defendant be liable to the deceased's estate due to the second defendant's late disclosure (ICU chart)?;

(5) did the learned High Court judge commit any error of law and/or fact in awarding the following damages:

(a) special damages, namely:

(i) deceased's hospital/medical expenses (RM100,000);

(ii) expenses (prayer ceremony) of an amount of RM5,000;

(iii) funeral expenses (RM30,000); and

(iv) costs (pre-trial discovery suit) of a sum of RM6,000.

(b) the following heads of general damages:

(i) pain, suffering and loss of amenities (RM100,000); and

(ii) loss of contribution (RM288,000).

(c) aggravated damages (RM350,000)? In this regard, should the second defendant be liable for aggravated damages when the reasons supporting the aggravated damages were caused solely by the first defendant?

The resolution of the above issues will entail a discussion of s 7(3), provisos (ii) and (iv) to s 7(3) and s 8(2)(c) of the CLA; and

A (6) if the second defendant was liable to the deceased's estate in this case:

(a) does the majority judgment (*Siow Ching Yee*) bar the second defendant from seeking any indemnity or contribution from the first defendant with regard to the second defendant's liability to the deceased's estate? and

B

(b) if the majority judgment (*Siow Ching Yee*) does not bar the second defendant from seeking any indemnity or contribution from the first defendant, whether the second defendant was entitled to a 100% indemnity from the first defendant in respect of the second defendant's liability to the deceased's estate. This issue discusses the effect of the CA, s 10(1)(c) and (2) of the CLA.

C

OUR DECISION

D G. THE NATURE OF A DOCTOR'S DUTY OF CARE TO PATIENTS

[25] With regard to the tort of professional medical negligence, a doctor owes a duty of care to a patient in respect of the following three matters:

E (1) the doctor's diagnosis of the patient's medical problem ('diagnosis');

(2) the doctor's advice to the patient ('advice (proposed treatment/surgery)') regarding the proposed treatment and/or surgery for the patient ('proposed treatment/surgery'); and

F (3) the treatment/surgery which had been carried out in relation to the patient.

[26] The standard of the duty of care for advice (proposed treatment/surgery) ('duty of care (advice (proposed treatment/surgery))') has been explained by our Federal Court as follows:

G

(1) in *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593, at pp 597, 603 and 605, Siti Norma Yaakob FCJ (as she then was) decided as follows:

H

> *The question of law that is posed to us in this appeal is couched in the following words*.
>
> > Whether the Bolam Test as enunciated in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 in the area of medical negligence should apply in relation to all aspects of medical negligence?
>
> I
>
> ...
>
> *It cannot be disputed that the first respondent was under a duty to advise the appellant on the course of treatment to be undertaken and the risks involved and the issue is whether there has been a breach of that duty*.

...

That said, we are of the opinion that the Bolam test has no relevance to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of the proposed treatment The practitioner is duty bound by law to inform his patient who is capable of understanding and appreciating such information of the risks involved in any proposed treatment so as to enable the patient to make an election of whether to proceed with the proposed treatment with knowledge of the risks involved or decline to be subjected to such treatment. (Emphasis added.)

(2) according to Raus Sharif PCA (as he then was) in *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438, at paras [5], [54], [55], [57] and [94] to [97]:

[5] *Leave to appeal was granted by this court on 29 January 2015 on two questions of law which read*:

Question 1:

Whether the Bolam test or the test in the Australian case of Rogers v Whitaker (1993) 4 Med LR 79 *in regard to the standard of care in medical negligence should apply, following conflicting decisions of the Court of Appeal in Malaysia and legislative changes in Australia, including the re-introduction there of a modified Bolam test*.

...

[54] *Question 1 raises the issue as to whether the Bolam test or the test in the Australian case of Rogers v Whitaker with regard to the standard of care in medical negligence should apply*.

[55] *Before answering the question, it should be noted that this court in Foo Fio Na made specific reference to the test in Rogers v Whitaker. This is significant because Rogers v Whitaker was entirely concerned with the duty to advise and no more. That entire case concerns a medical practitioner's duty to advise, drawing the distinction between the duty to advise and the duty to diagnose or treat ...*

...

[57] *Based on the above, we are of the view that the decision of this court in Foo Fio Na must necessarily be limited only to the duty to advise of risks, this is because in coming to the said decision, it had made specific reference to Rogers v Whitaker, acknowledging it to be the applicable test This court in Foo Fio Na however dealt only with a medical practitioner's duty to advise of risks associated with a proposed treatment It did not deal with the standard of care expected in respect of either diagnosis or treatment*.

...

[94] *Thus, it is our judgment that in respect of the standard of care in medical negligence cases, a distinction must be made between diagnosis and treatment on the one hand and the duty to advise of risks on the other. This is because diagnosis and treatment are purely in the realm of medicine and that in the field of*

medicine, there are genuine differences of professional opinion in respect of diagnosis and treatment Although as a discipline, medicine involves specific knowledge, its practice, however, often does not admit to scientific precision. It is not always the case that there is a definite answer one way or the other. In fact, medical experts do genuinely and frequently differ in opinion on diagnosis and treatment.

[95] *Given the fact that there are genuine differences in opinion in diagnosis and treatment, it is therefore not a matter that the court can, or is, equipped to resolve. It is in this context that the Bolam test makes good sense. It requires the court to accept, not just the views of medical experts simpliciter, but the views of a responsible body of men skilled in that particular discipline. It removes from the courts the responsibility of resolving a dispute that is not equipped to resolve*.

[96] *On the other hand, different consideration ought to apply to the duty to advise of risks as opposed to diagnosis and treatment That duty is said to be noted in the right of self-determination. As decided by the Australian High Court in Rogers v Whitaker and followed by this court in Foo Fio Na, it is now the courts' (rather than a body of respected medical practitioners) which will decide whether a patient has been properly advised of the risks associated with a proposed treatment The courts would no longer look to what a body of respectable members of the medical profession would do as the yardstick to govern the standard of care expected in respect of the duty to advise*.

[97] *Based on the foregoing, we will answer question 1 in the following manner. The test propounded by the Australian case in Rogers v Whitaker and followed by this court in Foo Fio Na in regard to standard of care in medical negligence is restricted only to the duty to advise of risks associated with any proposed treatment and does not extend to diagnosis or treatment. With regard to the standard of care for diagnosis or treatment, the Bolam test still applies, subject to qualifications as decided by the House of Lords in Bolitho*. (Emphasis added.)

[27] Mr Manmohan had referred us to UK's Supreme Court case of *Montgomery v Lanarkshire Health Board (General Medical Council intervening)* [2015] 2 All ER 1031. In *Montgomery*, at [87], Lord Kerr and Lord Reed JJSC delivered the following joint judgment:

[87] *The correct position, in relation to the risks of injury involved in treatment, can now be seen to be substantially that adopted in Sidaway by Lord Scarman, and by Lord Woolf MR in Pearce, subject to the refinement made by the High Court of Australia in Rogers v Whitaker, which we have discussed at paras [77]–[73]. An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it*. (Emphasis added.)

[28] We are of the view that the judgment in *Montgomery* should apply in this country regarding the duty of care (advice (proposed treatment/surgery)). This is because firstly, neither public policy nor principle oppose the application of *Montgomery* in Malaysia. Furthermore, the duty of care (advice (proposed treatment/surgery)) in Malaysia should not differ from that which is applicable in UK.

[29] Premised on *Foo Fio Na* and *Montgomery*, the duty of care (advice (proposed treatment/surgery)) is as follows:

(1) a doctor has a duty to take reasonable care to ensure that the patient is informed of two matters:

(a) any inherent or material risk involved in the proposed treatment/surgery; and

(b) any reasonable alternative to the proposed treatment/surgery or variant of the proposed treatment/surgery,

– so as to enable the patient to make an informed decision and elect on whether to proceed or not with the proposed treatment/surgery; and

(2) a risk is material if:

(a) a reasonable person in the patient's position would be likely to attach significance to the risk; *and/or*

(b) the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to the risk.

[30] With regard to the standard of the duty of care for a doctor's diagnosis, treatment and/or surgery ('duty of care (diagnosis/treatment/surgery)'):

(1) what was the view of the general body of doctors regarding the diagnosis/treatment/surgery for the patient at the material time ('view of General Body of Doctors (patient's diagnosis/treatment/surgery)') — please refer to the judgment of McNair J in UK's High Court case of *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, at 586 to 588. *Bolam* had been affirmed by our Federal Court in *Zulhasnimar*, at [97];

(2) can the view of General Body of Doctors (patient's diagnosis/treatment/surgery) withstand logical analysis? — please refer to the decision of Lord Browne-Wilkinson in the House of Lords in *Bolitho v City and Hackney Health Authority* [1997] 3 WLR 1151, at p 1160. *Bolitho* had been approved in *Zulhasnimar*, at [97]; and

(3) if the view of General Body of Doctors (patient's diagnosis/treatment/surgery) could withstand logical analysis, whether

A the doctor's diagnosis/treatment/surgery was done in accordance with the view of General Body of Doctors (deceased's diagnosis/treatment/surgery).

If the answer to the above question is:

B (a) in the affirmative, the doctor cannot be liable for professional medical negligence; and

(b) negative, the doctor has committed professional medical negligence.

C H. WHETHER THE FIRST DEFENDANT HAD COMMITTED PROFESSIONAL MEDICAL NEGLIGENCE WITH REGARD TO THE DECEASED

H(1) Had the first defendant breached his duty of care in his advice to the deceased's D *parents regarding the sinus surgery (duty of care (advice on sinus surgery))?*

[31] On 28 March 2014, due to the deceased's brain infection, he was not able to understand any advice given by the first defendant. Consequently:

E (1) the deceased could not give any informed consent for the first defendant's sinus surgery to be performed on the deceased; and

(2) only the deceased's parents could give an informed consent at the meeting (first defendant-deceased's parents (28 March 2014)) for the sinus surgery to be conducted on the deceased by the first defendant provided F that the first defendant had informed the deceased's parents at the meeting (first defendant-deceased's parents (28 March 2014)) regarding the following two matters (two matters):

(a) all the inherent and/or material risks involved in the sinus surgery; G *and*

(b) any reasonable alternative to the sinus surgery,

– which would enable the deceased's parents to make an informed decision and elect on whether to allow the first defendant to proceed or not with the sinus surgery on the deceased. H

[32] We have no hesitation to uphold the High Court's factual decision that there was evidence on a balance of probabilities the first defendant had breached the duty of care (advice on sinus surgery). Our decision is premised on the following evidence and reasons: I

(1) the first defendant's guarantee letter request form (9.15pm, 27 March 2014) (which requested for the deceased's insurer to guarantee payment of the sinus surgery) had already been signed by the first defendant and sent even before the meeting (first defendant-deceased's parents (28 March 2014)).

The first defendant had a financial motive for sending the first defendant's guarantee letter request form (9.15pm, 27 March 2014) ('first defendant's financial motive') as understood in s 8(1) of the Evidence Act 1950 ('the EA'). Reproduced below is s 8(1) of the EA:

> s 8(1) *Any fact is relevant which shows or constitutes a motive* or preparation *for any fact in issue or relevant fact*. (Emphasis added.)

In view of the first defendant's financial motive, the first defendant had no intention to fulfil the duty of care (advice on sinus surgery) in the first place.

We should state that any request by a private doctor or private hospital to a patient's insurer to guarantee payment of the patient's treatment and/or surgery, should only be made *after* the doctor has:

(a) examined the patient;

(b) given a diagnosis to the patient;

(c) fulfilled the duty of care (advice on sinus surgery); and

(d) obtained an informed consent by the patient to the proposed treatment and/or surgery.

(2) the first defendant had been practising as an ENT surgeon since 1990. In other words, before 27 March 2014, the first defendant had professional experience as an ENT consultant of about 24 years. Hence, the first defendant could not feign lack of experience and knowledge as an ENT consultant by signing and sending the first defendant's guarantee letter request form (9.15pm, 27 March 2014) without:

(a) informing the deceased's family members regarding the two matters; and

(b) obtaining the informed consent of the deceased's parents for the sinus surgery.

(3) after the preparation of the first defendant's guarantee letter request form (9.15pm, 27 March 2014), Dr Meena met the deceased's family members on the same night and explained to them Dr Meena's diagnosis/proposed treatment (10.15pm, 27 March 2014). As had been done by Dr Meena, before the first defendant's guarantee letter request form (9.15pm, 27 March 2014) was signed and sent by the first defendant, the first defendant could have easily:

(a) called the deceased's family members to come to the Hospital during the night on 27 March 2014;

(b) explained the two matters to the deceased's family members; and

(c) obtained the informed consent of the deceased's parents for the sinus surgery.

(4) the duty of care (advice on sinus surgery) was breached by the first defendant because:

(a) the first defendant had prior actual knowledge of Dr Raihanah's diagnosis (27 March 2014) and Dr Meena's diagnosis/proposed treatment (10.15pm, 27 March 2014) regarding the deceased's brain infection. In fact, the first defendant agreed with Dr Raihanah's diagnosis (27 March 2014) and Dr Meena's diagnosis/proposed treatment (10.15pm, 27 March 2014);

(b) the first defendant should have advised the deceased's parents that Dr Raihanah's antibiotics administration (27 March 2014) could only take effect between 24 and 48 hours thereafter. In other words, the first defendant should have informed the deceased's parents that there was a reasonable alternative to the sinus surgery, namely, to wait for 24 to 48 hours for the outcome of Dr Raihanah's antibiotics administration (27 March 2014);

(c) according to the expert views of PW2 and DW3 (the first defendant's own expert neurologist) ('joint expert view (PW2/DW3)'), the sinus surgery was unrelated to the deceased's brain infection and could not have cured his brain infection. Hence, the first defendant should have advised the deceased's parents that the sinus surgery was not an emergency operation but purely an elective one. In fact, the second defendant's contemporaneous record of the Operating Theatre ('OT') classified the sinus surgery as an elective one (not an emergency or 'semi-emergency' operation).
If there is a conflict between contemporaneous documentary evidence and self-serving oral testimony, the court should accept the former and not the latter — please refer to judgment of the Court of Appeal delivered by Siti Norma Yaakob JCA (as she then was) in *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433; [2000] 4 CLJ 324, at p: 440 (MLJ); 330 (CLJ); and

(d) the first defendant should have informed the deceased's parents that the sinus surgery at 2pm on the same day would pose a material risk that the deceased's brain infection could get worse due to the fact that the sinus surgery was conducted with the administration of GA on the deceased and the GA would have made it difficult for Dr Raihanah's antibiotics administration (27 March 2014) to take effect ('material risk (sinus surgery)').
We have no doubt of the existence of the material risk (sinus surgery):

(i) which reasonable persons in the position of the deceased's parents would be likely to attach significance to the material risk (sinus surgery). In fact, PW suggested to the first defendant at the meeting (first defendant-deceased's parents (28 March 2014)) for the deceased to be

prescribed medicine before the first defendant's conduct of the sinus surgery but this suggestion was unfortunately declined by the first defendant; and/or

(ii) the first defendant, a consultant ENT of about 24 years' standing, was or should reasonably be aware that the deceased's parents would be likely to attach significance to the material risk (sinus surgery). We have not overlooked the first defendant's own medical notes ('first defendant's notes (28 March 2014)') which stated that the 'Risk of damage to orbit and anterior cranial fossa' had been explained by the first defendant to the deceased's parents at the meeting (first defendant-deceased's parents (28 March 2014)). The learned High Court judge did not accept the first defendant's notes (28 March 2014) because the written note ('nurse's note (meeting (28 March 2014))') of the second defendant's nurse ('nurse') who was present at the meeting (first defendant-deceased's parents (28 March 2014)), did not state that the first defendant had informed the deceased's parents that the sinus surgery would pose a risk that the deceased's brain infection might get worse.
The High Court was correct to attach weight to the nurse's note (meeting (28 March 2014)) because unlike the first defendant, the Nurse was an independent witness without any interest in the outcome of this case.

(5) the High Court's factual finding (first defendant's lack of credibility) was amply supported by the following evidence and reasons:

(a) as explained in the above sub-para (4)(d), the contents of the nurse's note (meeting (first defendant-deceased's parents (28 March 2014))) clearly undermined the first defendantk's reliability as a witness. Furthermore, the nurse's note (meeting (first defendant-deceased's parents (28 March 2014))) constituted contemporaneous documentary evidence to show that the first defendant's notes had been embellished to state falsely that the 'Risk of damage to orbit and anterior cranial fossa' had been explained by the first defendant to the deceased's parents at the meeting (first defendant-deceased's parents (28 March 2014)),
('embellishment (first defendant's notes)').
It is to be emphasised that the embellishment (first defendant's notes) for the purpose of being used in a judicial proceeding, ie., this suit, might constitute an offence of fabrication of false evidence under s 192 of the Penal Code ('the PC) which could be punished with imprisonment up to seven years and/or a fine pursuant to s 193 of the PC;

(b) the first defendant's guarantee letter request form (9.15pm, 27 March 2014) was concealed from the deceased's parents at the meeting (first defendant-deceased's parents (28 March 2014)) ('concealment (first defendant's guarantee letter request form)');

(c) the first defendant misrepresented to the deceased's parents at the

meeting (first defendant-deceased's parents (28 March 2014)) that:

(i) the results of the deceased's CT brain scan showed that he was suffering from severe pansinusitis which affected his brain;

(ii) 'based on the investigation results, the (deceased's) sinuses were the probable cause and site from where the infection started' — answer to question No 15 WS (first defendant); and

(iii) the sinus surgery was necessary 'to help to reverse the (deceased's) disease' — answer to question No 16 WS (first defendant),

('first defendant's misrepresentation (deceased's parents)'). It was clear that was the first defendant's misrepresentation (deceased's parents) was not true because according to the joint expert view (PW2/DW3), the sinus surgery was not related to the deceased's brain infection and could not have cured the deceased's brain infection.

(d) the second defendant had allocated the use of the OT in the Hospital for the first defendant's use at 2pm, 28 March 2014 ('first defendant's OT slot (2pm, 28 March 2014)'). The first defendant 'rushed' to conduct the sinus surgery on the deceased at about 2.50pm, 28 March 2014 so as not to forego the monetary benefit of the first defendant's OT slot (2pm, 28 March 2014). Such a conduct by the first defendant (which was relevant under s 8(1) of the EA) clearly demonstrated the first defendant's financial motive for the breach the first defendant's duty of care (advice on sinus surgery).

[33] In any event, as explained in the above para 32, we are unable to find that the High Court's factual finding (first defendant's negligence) and High Court's factual finding (first defendant's lack of credibility) to be 'plainly wrong' in the sense that:

(1) the High Court's factual finding (first defendant's negligence) and High Court's factual finding (first defendant's lack of credibility) could not be reasonably explained or justified; *and*

(2) no reasonable trial judge could have arrived at the High Court's factual finding (first defendant's negligence) and High Court's factual finding (first defendant's lack of credibility),

– please refer to the judgment of the Federal Court delivered by Zabariah Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, at [33] and [34].

[34] In view of the evidence and reasons explained in the above para 32, PW1's consent (sinus surgery) was not valid. As such, both the defendants could not rely on PW1's consent (sinus surgery) as a defence in this case.

[35] We wish to add that the defendants could not rely on Madam Ng's discharge form to exonerate them from liability in this case because there was sufficient evidence on a balance of probabilities that the first defendant had breached the duty of care (advice on sinus surgery): please refer to the above para 32.

H(2) Whether the first defendant had breached his duty of care by performing the sinus surgery (duty of care (conduct of sinus surgery))

[36] We are of the view that the High Court's factual finding (first defendant's negligence) regarding the first defendant's breach of the duty of care (conduct of sinus surgery) was not plainly erroneous. The following evidence and reasons support our decision:

(1) premised on the joint expert view (PW2/DW3) (as supported by medical literature), the view of General Body of Doctors (deceased's diagnosis/treatment) was for the first defendant to wait for at least 24 hours from the time of Dr Raihanah's antibiotics administration (27 March 2014) at 6pm, before the sinus surgery could be performed by the first defendant;

(2) Dr Meena's proposed steroids treatment was postponed for 48 hours because Dr Meena wanted to wait for the outcome of Dr Raihanah's antibiotics administration (27 March 2014);

(3) the GA (administered to the deceased for the purpose of the sinus surgery) would have made it difficult for Dr Raihanah's antibiotics administration (6pm, 27 March 2014) to take effect;

(4) the view of General Body of Doctors (deceased's diagnosis/treatment) could withstand logical analysis;

(5) when the first defendant conducted the sinus surgery on the deceased at about 2.50pm, 28 March 2014, he had breached his duty of care (conduct of sinus surgery) because:

(a) the first defendant had acted contrary to the view of General Body of Doctors (deceased's diagnosis/treatment) by performing the sinus surgery about 17 hours after Dr Raihanah's antibiotics administration (27 March 2014). In other words, the sinus surgery was negligently conducted by the first defendant without giving any opportunity for Dr Raihanah's antibiotics administration (27 March 2014) to take effect for at least a period of 24 hours;

(b) the first defendant agreed with Dr Raihanah's diagnosis (27 March 2014) and Dr Meena's diagnosis/proposed treatment (10.15pm, 27 March 2014). As such, the first defendant should have discussed with Dr Raihanah and Dr Meena before proceeding with the sinus surgery; and

(c) the first defendant should have allowed the proposed MRI scan (12pm, 28 March 2014) to be performed on the deceased. If the proposed MRI scan (12pm, 28 March 2014) had been carried out:

(i) the first defendant would have the benefit of the results of the deceased's MRI scan; and

(ii) there would be sufficient time for Dr Raihanah's antibiotics administration (6pm, 27 March 2014) to take effect.

(6) it is difficult to accept the first defendant's defence because of his own lack of credibility as found as a fact by the learned High Court judge — please refer to the above sub-para 32(5).

[37] The learned High Court judge did not commit a plain error of fact by rejecting the expert opinion of DW2 as part of the view of General Body of Doctors (deceased's diagnosis/treatment). This was due to the fact that DW2 gave the following false expert evidence ('DW2's false expert evidence'):

(1) DW2's expert report (filed in court and served on the solicitors for the deceased's estate before the commencement of the trial) initially stated that it was acceptable for the first defendant to have waited 'for 24 hours' from the Dr Raihanah's antibiotics administration (27 March 2014) before conducting the sinus surgery.
After PW2, the expert for the deceased's estate, had given his expert testimony, DW2 disingenuously amended his expert report during his examination-in-chief ('EIC') to state that it was acceptable for the first defendant to have waited 'within 24 hours' from the Dr Raihanah's antibiotics administration (27 March 2014) before the first defendant performed the sinus surgery;

(2) DW2 gave an expert view that the general practitioner ('GP') who had previously treated the deceased on 26 March 2014, had prescribed antibiotics to the deceased. Such an expert testimony was not borne out by the GP's own medical records; and

(3) DW2 incredulously gave sworn testimony during his EIC that the deceased suffered a fever before the sinus surgery. However, when cross-examined, DW2 subsequently admitted there was no medical record to prove that the deceased had a fever before the sinus surgery. O 40A r 2 of the Rules of Court 2012 ('the RC') provides as follows:

Expert's duty to the Court

(1) *It is the duty of an expert to assist the Court on the matters within his expertise*. A

(2) *This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid*. (Emphasis added.)

This judgment serves as a stark reminder of an expert's duty (pursuant to O 40A r 2(1) and (2) of the RC) to assist the court on matters within the expert's expertise and this duty overrides the expert's obligation to the persons from whom the expert has received instructions or by whom the expert is paid — please refer to the Court of Appeal's judgment delivered by Vernon Ong Lam Kiat JCA (as he then was) in *Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia Tenaga Nasional Bhd* [2015] 5 MLJ 52, at [35] to [37]. B C

[38] At this juncture, we wish to address the first defendant's contention that the learned High Court judge had 'misunderstood' the joint expert view (PW2/DW3) which was given with the benefit of hindsight It was decided by Singapore's Court of Appeal in *Hii Chii Kok*, at [157] to [160], as follows: D

The need to guard against hindsight and outcome bias

[157] *Before we leave this part of our analysis, we wish to make a general observation, cutting across all three aspects of medical care, on the nature of the inquiry before the court in a case of medical negligence. A ruling of whether there was medical negligence is inevitably one that is made months, if not years after the fact. The material events are reconstructed, with both sides adducing evidence that seek to support their case on some specific act or omission, such as what the doctor should have concluded, what the patient should have been told, or how the doctor should have conducted an operation.* E F

[158] *Research suggests that medical experts can exhibit 'hindsight bias' in that 'a retrospective reviewer, knowing the outcome of an event, may have an exaggerated sense of their own probable ex ante ability to predict it' (Thomas B Hugh and Sidney WA Dekker, 'Hindsight Bias and Outcome Bias in the Social Construction of Medical Negligence: A Review' (2009) 16(5) JLM 846 at 848). There is also the related possibility of 'outcome bias', which refers to the influence of outcome knowledge upon evaluations of decision quality. This is evidently more likely to occur when doctors make judgments on the appropriateness of care by other doctors being aware of what subsequently transpired, with one study suggesting that it was not just the willingness to make judgments but the harshness of judgments that increased when there had been an adverse or severe outcome (at 849). It has also been suggested that both forms of bias are not only influential in medical expert reports but can also directly influence the decisions of lawyers and judges (at 847).* G H

[159] *In this regard, we emphasise the critical importance of ensuring that the courts, in evaluating whether the doctor has met the requisite standard of care in any aspect of his interaction with the patient, should apply the relevant tests with reference only to the facts that were known at the time that the material event occurred. As was held by the High Court of Australia in Rosenberg v Percival* [2001] HCA 18 *at [68] citing a previous decision of the same court in Maloney v Commissioner for Railways* (1978) 18 ALR 147 *at 148, 'perfection or the use of increased knowledge or experience embraced in* I

hindsight after the event should form no part of the components of what is reasonable in all the circumstances'.

[160] *In relation to diagnosis then, it is irrelevant that the diagnosis eventually turned out to be wrong because this does not answer the question of whether the process by which the doctor arrived at the diagnosis was negligent As mentioned above, the process of medical diagnosis is often prone to imprecision (see [101] above) and would be dependent on a synthesis and analysis of the information that was available at the time of the diagnosis. After the material events have come to pass, it may well be that new insights are gained. However, such knowledge should not be considered by the courts because the enquiry should be based on what was known at the time of the allegedly negligent diagnosis.* (Emphasis added.)

We are not able to accept the above submission by the first defendant that the joint expert view (PW2/DW3) was influenced by 'hindsight bias' or 'outcome bias' as explained in *Hii Chii Kok*. Our reasons are as follows:

(1) according to the prevailing medical knowledge on 28 March 2014 (death of the deceased), Dr Raihanah's antibiotics administration (27 March 2014) could only take effect between 24 and 48 hours from the time of Dr Raihanah's antibiotics administration (27 March 2014). Such medical knowledge formed part of the view of General Body of Doctors (deceased's diagnosis/treatment). Accordingly, the joint expert view (PW2/DW3) was not influenced by any 'hindsight bias' or 'outcome bias'; and

(2) Dr Meena's proposed steroids treatment was made to the deceased's family members at 10.15pm, 27 March 2014 and yet, Dr Meena's proposed steroids treatment was postponed because Dr Meena herself wanted to wait for 48 hours (after the outcome of Dr Raihanah's antibiotics administration (27 March 2014)). In other words, Dr Meena was aware on 27 March 2014 of the medical need to wait for Dr Raihanah's antibiotics administration (27 March 2014) to take effect.

[39] We are unable to accept the first defendant's submission that the deceased's estate failed to call an independent neurologist to support this suit and consequently, the court should have drawn an adverse inference against the deceased's estate under s 114(g) of the EA.

Firstly, DW3 is a consultant neurologist and his expert opinion, together with the expert evidence of PW2, was sufficient to form the view of General Body of Doctors (deceased's diagnosis/treatment) (the basis for the High Court to decide that the first defendant had breached the duty of care (conduct of sinus surgery)).

Secondly, an adverse inference can only be drawn by the court under s 114(g) of the EA against a party for suppressing material evidence — please refer to the Supreme Court's judgment delivered by Mohd Azmi SCJ in *Munusamy*

v Public Prosecutor [1987] 1 MLJ 492, at p 494. In this case, the deceased's estate had not suppressed any material evidence at the Trial which could justify an invocation of an adverse inference pursuant to s 114(g) of the EA against the deceased's estate.

I. DID THE FIRST DEFENDANT'S NEGLIGENCE CONTRIBUTE MATERIALLY TO THE DECEASED'S DEATH?

[40] With regard to the issue of whether the first defendant's professional medical negligence had materially contributed to the deceased's death, we rely on the following judgment of the Federal Court delivered by Richard Malanjum CJ (Sabah and Sarawak) (as he then was) in *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1, at [36]:

> [36] *In the light of these authorities, we are of the view that the 'but for' test is not the exclusive test to be applied to determine causation of the injury. It can still be applied but not in circumstance when there are two or more acts or events or factors that could or contribute to the injury of the plaintiff. This instant case is a case in point where evidence is established that there are a multiple of factors that could bring about the injury to the plaintiff. And to decide whether there is causation in these circumstances the approach of Lord Reid in Bonnington Casting Ltd v Wardlaw: whether any of these acts or events or factors has materially contributed to the plaintiffs injury should be adopted. What is a material contribution must be a question of degree. This is for the court to decide but certainly anything that is trifle is not material. As Lord Reid in the same case expounded: 'contribution which comes within the exception of de minimis non curat lex (the law does not concerns itself with trifles) is not material'.* (Emphasis added.)

[41] We are more than satisfied that the first defendant's negligence:

(1) in obtaining PW1's consent (sinus surgery) by way of a breach of the first defendant's duty of care (advice on sinus surgery) (please refer to the above para 32); and

(2) with regard to the breach of the first defendant's duty of care (conduct of sinus surgery) (explained in the above para 36),
– were *'material contributing causes'* of the death of the deceased because:

   (a) if the first defendant had not breached his duty of care (advice on sinus surgery), PW1's consent (sinus surgery) would not have been given and the deceased's death would have been avoided. In this regard, we cannot accept the first defendant's contention that there was no link between the way in which the first defendant had obtained PW1's consent (sinus surgery) and the death of the deceased;

   (b) premised on the joint expert view (PW2/DW3), the sinus surgery was unrelated to the deceased's brain infection and could not have

cured his brain infection. In other words, if the first defendant had not conducted the sinus surgery, there would have been sufficient time for Dr Raihanah's antibiotics administration (27 March 2014) to take effect;

(c) the GA (administered to the deceased during the sinus surgery) would have made it difficult for Dr Raihanah's antibiotics administration (6pm, 27 March 2014) to take effect; and

(d) if the sinus surgery was not performed by the first defendant on 28 March 2014, the proposed MRI scan (12pm, 28 March 2014) would have proceeded and the full extent of the deceased's brain infection could then be discovered.

[42] Based on the evidence and reasons stated in the above para 41, we wish to add that the deceased's death could have been easily averted 'but for':

(1) the breach of the first defendant's duty of care (advice on sinus surgery) which caused PWTs consent (sinus surgery) and the subsequent sinus surgery; and

(2) the breach of the first defendant's duty of care (conduct of sinus surgery).

J. WAS THE SECOND DEFENDANT VICARIOUSLY LIABLE FOR THE FIRST DEFENDANT'S NEGLIGENCE IN THIS CASE?

[43] The following clauses in the CA are pertinent:

(1) the first defendant 'shall be liable for any negligence' in the discharge of the first defendant's professional duties (cl 3.10.1 of the CA);

(2) the first defendant 'undertakes and agrees ... to be insured by an assurance company' acceptable to the second defendant 'which would provide compensation for negligence' of the first defendant (cl 3.10.2 of the CA); and

(3) during the duration of the CA, the first defendant is deemed to be an independent contractor of the second defendant and not the agent or employee of the second defendant (cl 9.1 of the CA).

[44] We accept the contention by Mr Felix Raj that the learned High Court judge committed an error of law in deciding that the second defendant was vicariously liable to the deceased's estate for the first defendant's professional medical negligence ('High Court's legal error (second defendant)'). Our reasons regarding the High Court's legal error (second defendant) are as follows:

(1) the Supreme Court of UK had delivered the following judgment in

Woodland, at [3]:

> [3] *In principle, liability in tort depends on proof of a personal breach of duty. To that principle, there is at common law only one true exception, namely vicarious liability. Where a defendant is vicariously liable for the tort of another, he commits no tort himself and may not even owe the relevant duty, but is held liable as a matter of public policy for the tort of the other: Majrowski v Guy's and St Thomas's NHS Hospital Trust* [2007] 1 AC 224. *The boundaries of vicarious liability have been expanded by recent decisions of the courts to embrace tortfeasors who are not employees of the defendant, but stand in a relationship which is sufficiently analogous to employment*: *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1. *But it has never extended to the negligence of those who are truly independent contractors, such as Mrs Stop ford appears to have been in this case*. (Emphasis added.)

(2) the above judgment in *Woodland* had been adopted by our Federal Court in *Dr Kok Choong Seng*, at paras [3](iii), [3](iv), [38] and [39], as follows:

> [3] *Leave to appeal was granted by this court on 8 August 2016. In Civil Appeal No 02(f)-59–08 of 2016(B) (the appeal on liability), there were four questions of law posed:*
>
> *...*
>
> (iii) *Whether the criteria for imposing vicarious liability set out by Lord Phillips in the decision of the Supreme Court of UK in Various Claimants v Catholic Child Welfare Society and others* [2013] 2 AC 1 *and as further explained and elaborated by the Supreme Court of UK in Cox v Ministry of Justice* [2016] AC 660 *and Mohamud v WM Morrison Supermarkets pic* [2016] AC 677 *applies in Malaysia*?
>
> (iv) *Whether private hospitals in Malaysia such as the appellant hospital can or should be held vicariously liable for the tortious conduct or clinical negligence of medical doctors vis a vis their patients while practising at such private hospitals as independent contractors?*
>
> ...
>
> [38] *Non-delegable duties have been erroneously considered as a 'kind of vicarious liability', and adopted as part of the test to determine vicarious liability in some cases. This is a misconception. The two doctrines are similar in effect, in that they both result in liability being imposed on a party (the defendant) for the injury caused to a victim (the plaintiff) as a result of the negligence of another party (the tortfeasor). However, it bears emphasis that non-delegable duties and vicarious liability are distinct in nature and basis. The former imposes personal liability on the defendant for the breach of his own duty towards the plaintiff, based on the relationship between the defendant and the plaintiff, regardless of whom the defendant has engaged to perform the task. The latter imposes vicarious liability on the defendant for the tortfeasor's breach of duty towards the plaintiff, based on the relationship of employment between the defendant and the tortfeasor.*
>
> [39] *The doctrine of non-delegable duties has an independent scope of application*

apart from the realm of vicarious liability. A number of scenarios illuminate the distinction. Non-delegable duties, or positive duties to ensure that reasonable care is taken, may exist in situations where there is no vicarious liability: for instance where harm is caused as a result of a system failure and no individual tortfeasor can be identified, or where harm is caused by a third party to a plaintiff under the defendant's custody. Conversely, vicarious liability can operate in the absence of a non-delegable duty, in cases where the elements of a special hazard or a relationship of vulnerability or dependence are absent (eg an employee who negligently hits a pedestrian, while driving a vehicle in the course of employment). The two doctrines are conceptually and practically distinct. (Emphasis added.)

(3) in *Dr Hari Krishnan*, at paras [100], [108] and [114], the Federal Court had decided as follows:

[100] *The leave question in the hospital's appeal reads as follows:*

> Where the doctors are qualified professionals in a private hospital and working as independent contractors by virtue of a contract between the private hospital and the doctor, can the private hospital be held vicariously liable for the sole negligence of the doctors?

...

Distinction between vicarious liability and non-delegable duty

[108] *A fundamental point needs to be addressed at the outset It is apparent that counsel for the plaintiff and the courts below have laboured under the (mis)conception that liability for non-delegable duties is subsumed under, or the same as, vicarious liability. The two forms of liability are in fact conceptually distinct We have most recently elucidated the distinction between non-delegable duties and vicarious liability in the case of Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685: ...

...

[114] *Thus we would answer the question posed in the hospital's appeal in the negative: where the doctor is ascertained to be a truly independent contractor in the circumstances, the private hospital cannot be held vicariously liable for the sole negligence of that doctor. The true relationship between a private hospital and a doctor practising therein must be determined from the relevant contractual terms and the factual circumstances of the case.* (Emphasis added.)

(4) by virtue of cl 9.1 of the CA, the first defendant was neither an employee nor an agent of the second defendant. Hence, the second defendant could not be vicariously liable to the deceased's estate for the first defendant's negligence. Furthermore, cl 3.10.1 of the CA had expressly provided for the first defendant to be responsible for his own professional medical negligence. Lastly, in cl 3.10.2 of the CA, the first defendant had undertaken to be insured by an insurance company acceptable to the second defendant which would provide compensation for the first defendant's negligence.

[45] We have not overlooked the majority judgment of the Court of Appeal delivered by Supang Lian JCA in *Tan Sri Datuk Seri Mohd Hussein bin Abd Hamid v Gleneagles Hospital (Kuala Lumpur) Sdn Bhd & Anor* [2024] MLJU 3690 (majority decision (*Tan Sri Mohd Hussein*)). The majority decision (*Tan Sri Mohd Hussein*), at paras [163] to [165], has held the hospital to be vicariously liable to the appellant for the consultant orthopaedic surgeon's breach of the duty of care (advice (proposed treatment/surgery)) owed to the appellant on the following grounds:

> [163] *In the present case, whilst the first respondent [hospital] claims that the second respondent's [consultant orthopaedic surgeon] contractual relationship with the hospital is that of an 'independent contractor', Norjannah bt Ali (SD1), the first respondent's Head of Medical Affairs and Quality, admitted that there was no written contract between the first respondent and the second respondent*:
>
> > *[first respondent's counsel]*: *... Dr Norjannah, can you confirm that there is no written contract between Gleneagles, the First Respondent and the Second Respondent, Dr Charanjeet*?
> >
> > *SD1*: *Yes. I can confirm that there is no written contract*.
>
> [164] Further, SD1 agreed under cross-examination that:
>
> (a) the hospital will coordinate the activities of credentialing and privileging of its consultants;
>
> (b) the appellant's contract is between him and the hospital, and there is no separate contract between the appellant and the consultants;
>
> (c) the consultants and the second respondent work together with the hospital in providing healthcare to its patients;
>
> (d) the second respondent is considered part of the hospital's organisation;
>
> (e) the consent form, operation theatre form and checklist for surgery used in the hospital are standardised forms prepared by the hospital in consultation with its consultants;
>
> (f) the Terms and Conditions of Service do not expressly state that the hospital is not liable for the wrongs of the consultant;
>
> (g) no other information is given to the patient regarding the hospital's liability for its consultants' wrongs;
>
> (h) that the hospital can take action against its consultants for their wrongs;
>
> (i) that the hospital can and does conduct inquiries into allegations against its consultants; and
>
> (j) that the hospital can terminate the services of consultants following such inquiries if the hospital deems it appropriate.
>
> [165] *Premised on the foregoing facts as evidenced at trial, when these facts are taken together, it points to a close connection between the second respondent and the hospital consistent with the first respondent owing a non-delegable duty. We also find that there is*

insufficient evidence to show that the second respondent was 'truly' an independent contractor. We are of the view that the hospital's Terms and Conditions of Service cannot be said to be sufficient and adequate notice to patients that the hospital is not responsible for the wrongs of its consultants. Therefore, we find that the hospital was vicariously liable for the negligence of the second respondent. (Emphasis added.)

It is to be noted that the Federal Court did not grant leave to appeal against the majority decision (*Tan Sri Mohd Hussein*).

We are of the view that unlike the majority decision (*Tan Sri Mohd Hussein*), there is the CA between the Hospital and second defendant. Hence, the majority decision (*Tan Sri Mohd Hussein*) can be distinguished from this case.

K. DID THE SECOND DEFENDANT OWE A NON-DELEGABLE DUTY OF CARE TO THE DECEASED?

K(1) The legal position before the majority judgment (Siow Ching Yee)

[46] The five features test (*Woodland*) together with the 'fair, just and reasonable' criteria (fair/just/reasonable criteria) have been laid down in *Woodland*, at paras [23] and [25] as follows:

> [23] *In my view, the time has come to recognise that Lord Greene MR in Gold's case [1942] 2 KB 293 and Denning LJ in Cassidy's case [1951] 2 KB 343 were correct in identifying the underlying principle, and while I would not necessarily subscribe to every dictum in the Australian cases, in my opinion they are broadly correct in their analysis of the factors that have given rise to non-delegable duties of care. If the highway and hazard cases are put to one side, the remaining cases are characterised by the following defining features*:
>
> (1) *The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.*
>
> (2) *There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself*:
>
> (i) *which places the claimant in the actual custody, charge or care of the defendant; and*
>
> (ii) *from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm*,
>
> *and not just a duty to refrain from conduct which will foreseeably damage the claimant It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.*
>
> (3) *The claimant has no control over how the defendant chooses to perform those*

obligations, ie whether personally or through employees or through third parties.

(4) *The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it*.

(5) *The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him*.

...

[25] *The courts should be sensitive about imposing unreasonable financial burden on those providing critical public services. A non-delegable duty should be imputed to schools only so far as it would be fair, just and reasonable to do so*. (Emphasis added.)

[47] In *Dr Kok Choong Seng*, at paras [3](i), [3](ii), [40], [61], [62] and [70], our Federal Court had adopted the five features test (*Woodland*) and the fair/just/reasonable criteria as follows:

[3] *Leave to appeal was granted by this court on 8 August 2016. In Civil Appeal No 02(f)-59–08 of 2016(B) (the appeal on liability), there were four questions of law posed*:

(i) *whether the doctrine of non-delegable duty of care expounded in Woodland v Swimming Teachers Association and others* [2014] AC 537 applies in Malaysia?

(ii) *if the doctrine of non-delegable duty of care as expounded in Woodland v Swimming Teachers Association and others* [2014] AC 537 *is applicable in Malaysia, whether the doctrine can or should apply to private hospitals such that those hospitals would be held liable for the tortious conduct or clinical negligence of medical doctors vis a vis their patients while practising there as independent contractors?*

...

[40] *In light of the above, we see no reason why the doctrine of non-delegable duty should not continue to be applied in Malaysia, and we consider the guiding principles refined in Woodland as a useful starting point Nevertheless, we hasten to stress that non-delegable duties impose more onerous obligations; it is worth reiterating the proviso in Woodland that such duties should be imposed only where it is fair, just and reasonable to do so based on the particular circumstances of the case, and developed incrementally from existing categories and consistently with underlying principles. With this reminder, we answer the first question in the affirmative.*

...

[61] *Read in their entirety, we do not consider that the relevant legislation (PHFSA and PHFSR) warrants the interpretation that private hospitals are mere providers of facilities and not medical treatment On the contrary, the legislative scheme clearly envisages that*

the function of private hospitals includes generally the 'treatment and care of persons who require medical treatment or suffer from any disease', and considers the services of medical practitioners as part of that function. The notion that the duty of a hospital is confined only to its facilities and staff selection has long been rejected in the common law. Such a notion is also incongruent with societal expectations of private hospitals as healthcare service providers; most patients do not perceive hospitals as providers of all the utilities and backup services except medical treatment Adopting Lord Greene's formulation, it is precisely medical treatment that patients expect when they knock on the door of the hospital.

Our decision on the second question

[62] *We therefore reject the arguments by counsel that all private hospitals are always or never under a non-delegable duty to patients, in respect of the medical treatment provided by doctors practicing there. Given that the role of the hospital may vary from patient to patient, the extent and scope of the hospital's duty towards the patient must be ascertained from the facts and circumstances of the case*.

...

[70] *Thus, we would answer the second question as follows: given the fact-sensitive nature of the Woodland test, whether private hospitals are in breach of a non-delegable duty to their patients by reason of the negligence of doctors practising there cannot be predetermined by a general pronouncement, but assessed based on the facts and circumstances of each case.* (Emphasis added.)

[48] The Federal Court in *Dr Hari Krishnan*, at paras [131] to [140], had found that the private hospital owed a non-delegable duty of care to the plaintiff with regard to the functions of the second appellant (anaesthetist). It was further decided in *Dr Hari Krishnan*, at paras [129], [140] and [142], as follows:

[129] *It is convenient at this juncture to deal with the argument raised by counsel for the hospital that private hospitals in Malaysia, being different from the National Health Service hospitals in the UK, are by nature invariably immune from liability for non-delegable duties to patients. This contention has been rejected in Dr Kok Choong Seng. In respect of the legislative scheme under the [PHFSA] and the relevant regulations, this court has held that: ...*

...

[140] *Therefore, applying the principles in Woodland, we conclude that the hospital owed a non-delegable duty to the plaintiff to ensure that reasonable care was taken in the anaesthetic services provided, and we hold the hospital liable for the breach of this duty.*

...

[142] *While the clarification in Dr Kok Choong Seng is a useful starting point in providing a framework for analysing liability for injuries caused by employers or independent contractors, we are mindful that the law on vicarious liability and non-delegable duty is in ongoing development We would take heed of the proviso in Woodland to 'proceed with caution, incrementally by analogy with existing categories, and consistently with some underlying principle', and to impose liability 'only in so far as it would be fair, just and reasonable'. To make a broad pronouncement on the liability of*

all private hospitals in medical negligence cases on the basis of policy alone would risk over-generalising the nuances of modern business relationships, and result in an unprincipled approach to liability. (Emphasis added.)

K(2) The effect of the majority judgment (Siow Ching Yee)

[49] The majority judgment (*Siow Ching Yee*) was delivered on 23 February 2024 (after the preparation of the High Court's GOJ on 29 July 2023). Hence, the learned High Court judge and all learned counsel in this case did not have the benefit of the majority judgment (*Siow Ching Yee*) during proceedings in the High Court.

[50] We reproduce below the relevant passages in the majority judgment (*Siow Ching Yee*), as reported in [2024] 3 MLJ 66, at paras [145], [148], [162], [209], [212], [219] to [228] and [238]:

[145] *On 14 February 2023, leave was granted on the following seven questions of law:*

(1) *whether the owner and manager of a hospital is in law a provider of healthcare and owes a non-delegable duty of care to patients as stated by the English Court of Appeal in the post Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 10 CLJ 529; [2017] 6 MLRA 367 *case of Hughes v Rattan* [2023] 1 All ER 300; [2022] EWCA Civ 107?

(2) *whether the judgment of the Federal Court in Dr Kok Choong Seng regarding the tort of negligence in a private hospital applies where the owner and manager of the hospital owes separately duties of care in contract and by statute?*

(3) *whether the owner and manager of a private hospital is liable to patients under a non-delegable duty of care when a doctor practising in the hospital as an independent contractor has insufficient professional indemnity for malpractice?*

(4) *if the answer is yes, whether the owner and manager, as a provider of healthcare, may escape liability for a breach of such duty of care committed by a doctor because the doctor is an independent contractor who has been engaged to practise in the hospital?*

(5) *whether there is a statutory duty of care , independent of a duty in negligence or contract, owed by the owner and manager of a private hospital under the [PHFSA] and the subsidiary legislation made thereunder;*

...

(1) *in light of the post Armes v Nottinghamshire County Council* [2018] 1 All ER 1 *decided by the Supreme Court of [UK], whether after applying the [five features test (Woodland), a court must additionally apply the test of whether it is fair, just and reasonable to impose a non-delegable duty of care in the circumstances of the case*?

[148] *This question was substantially addressed in Dr Kok Choong Seng & Anor v Soo*

Cheng Lin and another appeal [2018] 1 MLJ 685; [2017] 10 CLJ 529; [2017] 6 MLRA 367. *However, due to certain developments under English law, which was to a large extent, followed in that decision, we are now invited to revisit this area of jurisprudence.*

...

[162] *In this appeal, the central issue is whether the respondent owes a non-delegable duty of care to the patient, the appellant The [PHFSA] and [PHFSR] made thereunder are relied on to amplify and support the contention that such a duty of care exists in law and was established on the facts; in which case, the questions must be answered in the appellant's favour and the appeal allowed.*

...

[209] *Put simply, [PHFSA] applies to all healthcare facilities and services which are not provided by the government through public hospitals or institutions.*

...

[212] *All these reasonings accord with the observations of the Federal Court in Dr Kok on how [PHFSA] is to be read and is echoed again in this judgment; that a reading of [PHFSA] in its entirety yields an understanding of the inter-relational obligations and functions between the hospital and those who actually render treatment and care to the patients; that hospitals are and remain, providers of both the facilities for the treatment and care of patients as well as the treatment and care rendered.*

...

[219] *All these provisions fortify the understanding that the hospital is and remains responsible for not just the efficacy of premises or facilities but also for the treatment and care of the patients; regardless how and who the responsibility may have been delegated to. This is the intent of the legislative scheme, to the extent that the policy of the private hospital or healthcare facility or service is required to be placed in a conspicuous place of the premises so that persons coming to the hospital or healthcare facility or service is aware of such policy. Implicit in this structure and legislative scheme is already the balance and incorporation of the elements of fairness, just and reasonableness which need not be reconsidered as an entirely separate exercise or consideration. Persons approaching, using and relying on the treatment and healthcare rendered in these facilities and services should never have to concern themselves with issues of responsibility and separate accountability as negligence and mishaps would be furthest from their minds.*

[220] *On the facts in this appeal, the respondent is no doubt a private healthcare facility as it is a private hospital used and intended to be used for the reception, lodging, treatment and care of persons who require medical treatment or suffer from any disease. The respondent had also made the following statement to the appellant and to all persons using its healthcare facilities and services, available on its website concerning amongst others its facilities, treatment, care and procedures: ...*

...

[221] *From the reading of all these provisions, it is clear as daylight that the legislative scheme intends private hospitals such as the respondent to remain responsible for the treatment and care of the patients regardless to whom they may have employed, engaged or delegated that task or responsibility. This remains so even if the hospital is rendering*

emergency care services. In the case of the respondent, it renders such services on a routine basis.

[222] *As for the five Woodland features, I have no hesitation in finding them met. The first condition is easily fulfilled in the case of medical negligence such as the present appeal. The appellant is indeed in a vulnerable position and is totally reliant on the respondent for his care and treatment; more so when the appellant was admitted to its emergency services. As for the second feature of an antecedent relationship, this is well met by the both statutory framework which puts into place a relationship which deems an assumption of a non-delegable duty of care ; and also from the factual circumstances. I have already dealt with the statutory relationship.*

[223] *On the facts, the appellant was admitted to and in the respondent's emergency facilities and treated by its medical officer, prior to being referred to the first and second defendants. The reference to these defendants was by the respondent's own medical officer. These defendants are also part and parcel of the necessary professionals who must be available if the respondent was to provide emergency services on a routine basis — see reg 231. More important, the negligent act complained of took place during the care and treatment rendered within the respondent's premises using its facilities and services. It did not happen anywhere else; and this appears to have been overlooked in the case of Dr Kok. While Mr Soo may have been seen by Dr Kok both before and after the operation at his clinic outside Sunway Medical Centre, the operation where the medical negligence and cause of action took place was well within the walls of the hospital.*

[224] *In any case, given the extensive provisions in [PHFSA] and [PHFSR] made thereunder, it cannot be ignored that the intent of legislation is that the respondent assumes a non-delegable duty of care to the appellant and it remains liable personally for the negligence of the second defendant. It makes no difference the presence of the other defendants, save that the tort of negligence must always first be proved on the facts.*

[225] *In this appeal, that is not an issue. The elaborate, extensive and detailed provisions in both [PHFSA] and [PHFSR] are enacted for the purpose of ensuring patient safety and care whilst being treated in our private hospitals, private healthcare facilities and services, always remains paramount and to be observed by the private hospital or private healthcare facility or service itself. Not only does common law no longer see hospitals as mere providers of premises, utilities, facilities or backup services for such treatment and care of the patient, the law provides that private hospitals are themselves providers of such care and treatment of the patient in which case, the private hospitals or healthcare facilities or services owe a non-delegable and personal duty of care to persons who knock on their door and seek treatment and care.*

[226] *As for the third and fourth features, it is clearly evident that the appellant had no control over how the respondent was to perform its function of rendering emergency care and treatment; whether it would be rendered personally or through employees or some third parties such as the professionals it had engaged and to whom it had delegated the integral function of treatment and care of patients at its emergency services. In fact, having assumed a positive duty of care to the appellant in respect of emergency services, the respondent had delegated to its medical officer, and to the first and second defendants, the performance of its obligations and these persons were indeed performing those delegated functions at the material time.*

[227] *As for the fifth feature, it is undeniable that the second defendant was negligent in the performance of the very function of rendering proper emergency care and treatment*

of the appellant that was assumed by the respondent but delegated to her by the respondent

[228] *With all five features satisfied, it is clear that the respondent has assumed a non-delegable duty of care that it owes personally to the appellant, a patient that is admitted to its emergency services. The defence of independent contractor thus is not sustainable in law and on the facts and ought to have been rejected by the courts below.*

...

[238] *With the deliberations as set out above, I do not see the need to specifically answer the questions as posed. The Woodland features have to be refined in the context of our [PHFSA] in the manner discussed above.* (Emphasis added.)

[51] We are of the following view regarding the effect of the majority judgment (*Siow Ching Yee*):

(1) the majority judgment (*Siow Ching Yee*) can only apply in a situation where a medical consultant (X) (who was an independent contractor (not an employee or agent) of a private hospital (Hospital Z)) had committed professional medical negligence with regard to a patient (Y) (who had been previously admitted to Hospital Z);

(2) at Hospital Z, Y was treated only by X and not by any employee and/or agent of Hospital Z;

(3) when the court decides whether Hospital Z owed a non-delegable duty of care to Y, the application of the five features test (*Woodland*) has to be modified in light of the relevant provisions in PHFSA and PHFSR ('modified five features test (*Woodland*)');

(4) if an application of the modified five features test (*Woodland*) shows that Hospital Z owed a non-delegable duty of care to Y, the fair/just/reasonable criteria cannot be invoked to exclude such a non-delegable duty of care;

(5) any part of the Federal Court judgments in *Dr Kok Choong Seng* and *Dr Hari Krishnan* which is inconsistent with the legal position decided by the majority judgment (*Siow Ching Yee*) (as stated in the above sub-paras (3) and (4)) is considered to be implicitly overruled (overruled *sub silentio*) by the majority judgment (*Siow Ching Yee*); and

(6) until the majority judgment (*Siow Ching Yee*) is overruled, either expressly or impliedly, by our Federal Court, as a matter of stare decisis, the majority judgment (*Siow Ching Yee*) is binding on all courts subordinate to the Federal Court, including the Court of Appeal.

K(3) Application of the modified five features test (Woodland)

[52] We reproduce below s 31(1)(d) of the PHFSA and reg 47(1), (2)(b) and

(3) of the PHFSR:

s 31 PHFSA *Responsibilities*

(1) *A licensee or a holder of a certificate of registration in respect of a licensed or registered private healthcare facility or service shall —*

...

(d) *comply with such other duties and responsibilities as may be prescribed.*

reg 47 PHFSR *Valid consent*

(1) *A licensee or person in charge of a private healthcare facility or service shall obtain or cause to be obtained valid consent from a patient before any procedure or surgery is carried out on the patient.*

(2) *The valid consent under subregulation (1) shall be obtained from —*

(a) the patient;

(b) *if the patient is mentally or physically disable [sic], the spouse, parent or next of kin; or*

(c) if the patient is unmarried and below eighteen years of age, the parent or guardian.

(3) Consent obtained or caused to be obtained under this regulation shall be in writing. (Emphasis added.)

[53] Mr Felix Raj had referred us to the Hansard regarding the first, second and third reading of the Private Healthcare Facilities and Services Bill (Parliamentary Debate (PHFS Bill)). According to Mr Felix Raj, there was nothing in the Parliamentary Debate (PHFS Bill) to impose a non-delegable duty of care on a 'private healthcare facility' as defined in s 2 of the PHFSA. Mr Felix Raj further submitted that *Woodland* was decided in 2013 (way after the enforcement of the PHFSA on 1 May 2006).

[54] Firstly, if the provisions in the PHFSA are clear regarding the intention of the legislature, there cannot be any resort to the Parliamentary Debate (PHFS Bill). The court can only refer to the Hansard regarding a statutory provision if the statutory provision is ambiguous (so as to ascertain the intention of Parliament in legislating the statutory provision).

[55] Secondly, case law is always subject to written law. In fact, by way of statutes, our legislature can overrule or modify the effect of case law. Accordingly, the five features test (*Woodland*) could and had been modified by the PHFSA and PHFSR as laid down in the majority judgment (*Siow Ching Yee*).

[56] An application of the modified five features test (*Woodland*), in our view, reveals the following outcome:

(1) the second defendant had a positive statutory duty under s 31(1)(d) of the PHFSA read with reg 47(1) and (2)(b) of the PHFSR to obtain a 'valid' PW1's consent (sinus surgery) ('second defendant's statutory duty (PWTs consent (sinus surgery))'). As explained in the above para 31, PW1's consent (sinus surgery) could only be valid if PW1 was informed of the two matters, namely:

(a) the material risk (sinus surgery); *and*

(b) whether there was any reasonable alternative to the sinus surgery which would enable PW1 to make an informed decision and elect (on behalf of the deceased) on whether to proceed or not with the sinus surgery on the deceased.

(2) the first feature of the five features test (*Woodland*) was satisfied in this case because the deceased was:

(a) a patient of the second defendant in the Hospital;

(b) in an 'especially vulnerable' position; *and/or*

(c) dependent on the protection of the second defendant against the risk of injury to the deceased.

(3) there was fulfilment of the second feature of the five features test (*Woodland*) because there was an 'antecedent relationship' between the deceased and the second defendant (independent of the first defendant's professional medical negligence with regard to the deceased):

(a) which placed the deceased in the actual custody, charge or care of the second defendant; and

(b) from which it was possible to impute to the second defendant the assumption of a positive duty to protect the deceased from harm.

(4) the third feature of the five features test (*Woodland*) was present in this case because the second defendant had no control over the performance of the first defendant's obligations vis a vis the deceased, whether through the second defendant's employees or through third parties;

(5) there was fulfilment of the fourth feature of the five features test (*Woodland*) when the second defendant's statutory duty (PW1's consent (sinus surgery)) was delegated to the first defendant; and

(6) the fifth feature of the five features test (*Woodland*) was satisfied when the first defendant was negligent with regard to the second defendant's statutory duty (PW1's consent (sinus surgery)) in the performance of the very function assumed by the second defendant and delegated by the second defendant to the first defendant — please refer to the above para 32. In the circumstances, in respect of the second defendant's statutory duty (PWTs consent (sinus surgery)), the second defendant had

breached its non-delegable duty of care owed to the deceased ('second defendant's breach (non-delegable duty of care)').

L. WAS THE SECOND DEFENDANT LIABLE TO THE DECEASED'S ESTATE FOR THE SECOND DEFENDANT'S LATE DISCLOSURE (ICU CHART)?

[57] With respect to the learned High Court judge, the second defendant's late disclosure (ICU chart) could not support the sole cause of action of the deceased's estate against the second defendant (breach of the second defendant's non-delegable duty of care owed to the deceased). Furthermore, the second defendant's late disclosure (ICU chart) did not materially contribute to the deceased's death. Consequently, the learned High Court judge committed a plain error of mixed law and fact in deciding that the second defendant was liable to the deceased's estate due to the second defendant's late disclosure (ICU chart) ('High Court's mixed error of law/fact (second defendant)').

M. VALIDITY OF THE HIGH COURT'S DECISION ON THE SECOND DEFENDANT'S LIABILITY TO THE DECEASED'S ESTATE

[58] Notwithstanding the High Court's legal error (second defendant) and High Court's mixed error of law/fact (second defendant), as explained in the above para 56, premised on an application of the modified five features test (*Woodland*) as laid down in the majority judgment (*Siow Ching Yee*), the part of the High Court's decision which found the second defendant liable for the deceased's death, could be justified solely on the ground of the second defendant's breach (non-delegable duty of care).

N. SHOULD THERE BE APPELLATE INTERVENTION REGARDING THE HIGH COURT'S AWARD (DAMAGES)?

[59] The relevant parts of ss 7 and 8 of the CLA are reproduced below:

> s 7 *Compensation to the family of a person for loss occasioned by his death*
>
> (1) *Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code.*
>
> ...
>
> (3) *The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought*

for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under subsection (1):

Provided that —

(ii) *damages may be awarded in respect of the funeral expenses of the person deceased if such expenses have been incurred by the party for whose benefit the action is brought*;

...

(iv) *in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall —*

(a) take into account that where the person deceased has attained the age of fifty five years at the time of his death, his loss of earnings for any period after his death shall not be taken into consideration; and in the case of any other person deceased, his loss of earnings for any period after his death shall be taken into consideration if it is proved or admitted that the person deceased was in good health but for the injury that caused his death and was receiving earnings by his own labour or other gainful activity prior to his death;

(b) take into account only the amount relating to the earnings as aforesaid and the Court shall not take into account any prospect of the earnings as aforesaid being increased at any period after the person's death;

(c) take into account any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the person deceased at the time of his death;

(d) take into account that in the case of a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16; and in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time of his death, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time of death and dividing the remainder by the figure 2.

s 8 *Effect of death on certain causes of action*

...

(2) *Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person —*

(a) *shall not include any exemplary damages*, any damages for bereavement made under subsection 7(3A), any damages for loss of expectation of life and any damages for loss of earnings in respect of any period after that person's death;

...

(c) *where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate*

consequent on his death, except that a sum in respect of funeral expenses may be included. (Emphasis added.)

N(1) Special damages

[60] Firstly, we reject the submission by the first defendant that the deceased's estate could only claim for special damages which had been paid by the first administrator (deceased's estate) and not by PW1. It is clear from s 7(3) of the CLA that the deceased's estate could claim for the benefit of the deceased's estate 'any reasonable expenses incurred as a result of the wrongful act, neglect or default' of the defendants. There is nothing in ss 7 and 8 of the CLA which provides that a claim for special damages in an estate/dependency claim is confined to payment(s) made by the claimant himself or herself.

[61] Secondly, there is no requirement in our case law that a claim for special damages can only be allowed if there are supporting documents. We cite the following judgment of the Court of Appeal in *Qi Qiaoxian (claiming as the mother and dependent of Qi Xiangqing, deceased) & Anor v Sunway Putra Hotel Sdn Bhd* [2024] MLJU 732; [2024] 5 CLJ 734, at para [60]:

> [60] *With respect to the sessions court and the High Court, we are of the view that a claimant can claim for special damages based solely on the credible testimony of a witness. This decision is premised on the following reasons*:
>
> (1) *there is nothing in the EA which has provided, either expressly or by necessary implication, that special damages can only be proven by way of documentary evidence. In fact, s 134 of the EA has stated that no particular number of witness shall in any case be required for the proof of any fact*;
>
> (2) *in the High Court case of Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors* [2014] MLJU 1922; [2015] 1 CLJ 825, *at [39] and [40], Vazeer Alam Mydin Meera JC (as he then was) has decided as follows*:
>
> > [39] *Counsel for the defendants whilst agreeing that Nurul Husna may need to be fed special food, vitamins and nutritional supplements, argues that without proper documentary evidence of payment receipts for such purchases, a sum of RM200 per month would be more appropriate*.
> >
> > [40] *I allowed the sum of RM44,500 as claimed by the plaintiffs as the amount claimed is not farfetched in today's prices and it would be too much to expect Nurul Husna's parents to keep documentary proof of expenses incurred for these expenses since her birth. In this regard, I accept the submissions of counsel for the plaintiffs that the evidence was clear that the irreversible injuries and disabilities suffered by Nurul Husna had and continue to have an overwhelming and debilitating effect on her parents and carers. Their resources were centred on first saving her life and next caring for her. In such circumstances it is unreasonable to expect Nurul Husna's parents to collect bills and receipts and filing them away with a*

A *view to bringing a claim especially when the defendants had hidden their culpability in the treatment and management provided to Nurul Husna (see Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332; [1988] 2 CLJ 238; [1988] 2 CLJ Rep 82). *Indeed, if the defendants had candidly acknowledged their negligence earlier, than Nurul Husna's parents could have taken legal advice much earlier and kept copies of their bills and receipts to support their claim. In this regard, I accept that it would be unrealistic to expect Nurul Husna's parents have copies of bills and receipts for all of the expenses*.

(3) *in the Singapore High Court case of STU v The Comptroller of Income Tax* [1962] 1 MLJ 220 *at 221, Tan Ah Tah J gave the following judgment*:

In this case certain explanations given by the appellant to the officers of the Income Tax Department were rejected on the ground that there was no documentary evidence to support them. No doubt documentary evidence can in many cases be very cogent and convincing. The lack of it however, should not invariably be a reason for rejecting an explanation. Not every transaction is accompanied or supported by documentary evidence. Much depends on the facts and circumstances of the case, but if the person who is giving the explanation appears to be worthy of credit does not reveal any inconsistency and there is nothing improbable in the explanation, it can, in my view, be accepted. (Emphasis added.)

N(1A) Deceased's hospital/medical expenses (RM100,000)

[62] We are not able to accept the first defendant's submission that the deceased's estate could not recover the deceased's hospital/medical expenses (RM100,000) because the deceased would have required medical treatment for his serious condition. This was because the deceased had died due to the first defendant's professional medical negligence and the second defendant's breach (non-delegable duty of care). Accordingly, the deceased's hospital/medical expenses (RM100,000) constituted 'reasonable expenses incurred as a result of the wrongful act, neglect or default' of the defendants as understood in s 7(3) of the CLA. It is a different matter if the deceased had survived and in such an event, the deceased could not claim for the entire sum of the deceased's hospital/medical expenses (RM100,000).

N(1B) Expenses (prayer ceremony)

[63] The High Court had correctly awarded an amount of RM5,000 as expenses (prayer ceremony) because firstly, such an amount had been 'incurred as a result of the wrongful act, neglect or defaulf of the defendants within the meaning of s 7(3) of the CLA. If not for the first defendant's professional medical negligence and the second defendant's breach (non-delegable duty of care), the deceased's family would not have held a prayer ceremony for the deceased. In any event, a sum of RM5,000 as expenses (prayer ceremony) was

not 'so extremely high' so as to warrant appellate intervention — please refer to the judgment of Azmi CJ (Malaya) (as he then was) in the Federal Court case of *Topaiwah v Salleh* [1968] 1 MLJ 284 at p 285.

N(1C) Funeral expenses (RM30,000)

[64] The High Court was justified to award funeral expenses (RM30,000) pursuant to the proviso (ii) to s 7(3) and s 8(2)(c) of the CLA.

[65] With regard to the amount of RM30,000 as funeral expenses, Mr Manmohan Singh had relied on the following judgment of the Federal Court delivered by Hashim Yeop Sani FCJ (as he then was) in *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153, at p 156:

> *As regards funeral expenses the learned appellate judge also disallowed the claim mainly on the grounds that the funeral expenses had not been strictly proved. Here we feel that the case is in fact stronger for not interfering with the award of the learned President. Even during argument before us counsel for the respondent conceded that some expenses had been incurred as funeral expenses. Counsel for the appellant referred to the exchange of letters at pp 170 and 171of the appeal record. In a 'Without Prejudice' letter dated 23 July 1980 from solicitors of the respondent to solicitors of the appellant an offer was made to agree to funeral expenses at $750. As in the case of the claim for repair of the motorcycle referred to previously the appellant claimed in her evidence for funeral expenses incurred to the amount of $2,545.25 and produced 14 receipts which later were disputed by the respondent. The learned President awarded $2,000 for funeral expenses which he considered fair and reasonable obviously based partly on the oral testimony and partly using his own knowledge of Chinese funerals. The learned appellate judge referred to ss 56 and 57 of the [EA]. He said that the Act had laid down what the court can take judicial notice of and everything else must be proved. We think that s 57 of the [EA] merely sets out matters which the court must take Judicial notice of and the list therein is not exhaustive and the court under s 56 of the [EA] may also take judicial notice of matters which are of common and general knowledge. In arriving at a reasonable and fair amount of compensation to be awarded, it was not wrong for the learned President to take judicial notice of Chinese funeral expenses and the fact that such expenses are normally incurred and only the amount would vary according to the status of the deceased or such other matters which may be considered by the court. One has to be guided by what is reasonable. Thus in Hart v Griffith-Jones* [1948] 2 All ER 729 *Streatfield J allowed the cost of embalming but disallowed the cost of a monument over the grave of the deceased. The status or station in life of a deceased and other relevant matters may be considered in arriving at a fair and reasonable figure as funeral expenses.* (Emphasis added.)

In *Pang Ah Chee*, the Federal Court restored the sessions court's award of RM2,000 as funeral expenses. It is to be emphasised that the award of RM2,000 as funeral expenses in *Pang Ah Chee* was made before the delivery of the Federal Court's judgment in 1985, more than 29 years before the death of the deceased on 30 April 2014.

According to the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30, at pp 31 to 32, the court can take judicial notice of a matter which is not stated in s 57(1)(a) to (o) of the EA, if the matter fulfils the following two conditions cumulatively:

(1) the matter is 'subject of common and general knowledge and its existence or operation is accepted by the public without qualification or contention'; *and*

(2) the matter 'must be so sufficiently notorious' for which the court may assume the existence of the matter without proof,

('two cumulative conditions (judicial notice)').

We have no hesitation to decide that in fulfilment of the two cumulative conditions (judicial notice), the court can take judicial notice that funeral expenses have increased due to inflation and since *Pang Ah Chee*, an increase in funeral expenses from RM2,000 to RM30,000 over a period of more than 29 years, was not excessive. Additionally, we are not persuaded that an amount of RM30,000 as funeral expenses is manifestly excessive so as to justify our appellate intervention.

N(1D) Costs (pre-trial discovery suit)

[66] We accept Mr Felix Raj's submission that the deceased's estate could not recover the sum of RM6,000 as special damages for costs (pre-trial discovery suit) because such a claim had not been prayed for by the deceased's estate in the SOC. In this regard, we refer to the High Court's judgment in *Tropicana Golf & Country Resort Bhd v Loke Wei Kuen & Anor and other cases* [2022] MLJU 1969; [2023] 2 MLRH 453, at para [41], as follows:

> [41] *Case law has distinguished 'special damages' from 'general damages'. I rely on the following judgment of Lord Goddard in United Kingdom's (UK) House of Lords in British Transport Commission v Gourley* [1956] AC 185, *at 206*:
>
> > *First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded.* (Emphasis added.)

N(2) General damages

N(2A) Pain, suffering and loss of amenities (RM100,000)

[67] We do not find the amount of RM100,000 awarded by the High Court for pain, suffering and loss of amenities of life to be manifestly excessive. In the

following two estate/dependency claims based on professional medical negligence, the High Court had granted the same sum of RM100,000 for pain, suffering and loss of amenities of life:

(1) the judgment of Aliza Sulaiman JC (as she then was) in *Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors* [2019] 8 MLJ 331; [2019] 1 CLJ 626, at para [71]; and

(2) the decision of Norliza Othman J in *Navin Sharma a/l Karam Chand (menyaman sebagai pentadbir harta pusaka Suman Rampal a/p Hardyal Rampal, simati) & Anor v Bukit Tinggi Hospital Sdn Bhd & Anor* [2023] MLJU 2370, at para [36](i).

N(2B) Loss of contribution (RM288,000)

[68] We find no merit in the contentions of the defendants regarding the High Court's award of loss of contribution (RM288,000). This award was premised on the following evidence and reasons:

(1) the defendants did not allege that the High Court had failed to consider the proviso (iv)(a) to (d) to s 7(3) of the CLA in awarding the loss of contribution in favour of the deceased's estate;

(2) certain documents regarding the two companies had been adduced at the Trial in support of the claim for loss of contribution of the deceased's estate. This was not a case where the loss of contribution was awarded based solely on self-serving oral evidence; and

(3) the testimonies of PW1, PW4 and PW5. It is to be noted that PW4 is an impartial witness in this case. More importantly, the defendants did not adduce any evidence for the learned High Court judge to disbelieve PW1, PW4 and PW5 regarding the claim for loss of contribution by the deceased's estate. In this regard, we cite the judgment of See Mee Chun JCA in the Court of Appeal case of *Pantai Medical Centre Sdn Bhd v Fareed Reezal bin Arund (suing through his wife and litigation representative Wan Zafura bt Wan Kassim) and another appeal* [2022] 4 MLJ 529, at para [50], as follows:

> [50] *We find that although there were no documents to prove a monthly salary of RM15,500 and allowances, the fact that he was an executive director in Innovative was not disputed. If that be the case, he must surely have been earning a certain amount of salary to support and sustain a family and maintain a station in life as befits an executive director*. (Emphasis added.)

N(3) Aggravated damages (RM350,000)

[69] Firstly, in *Dr Hari Krishnan*, at paras [2](ii), [98] and [99], our Federal Court has recognised that the court may grant aggravated damages in professional medical negligence cases:

> [2] *Appeal No 02(f)-21-03 of 2015 ('the doctors' appeal') was filed by Dr Hari and Dr Namazie. In the doctors' appeal, this court granted leave for the following two questions*:
>
> ...
>
> (ii) *Whether aggravating factors should be compensated for as general damages, therefore rendering a separate award of aggravated damages unnecessary, as decided by the English Court of Appeal in Richardson v Howie* [2004] EWCA Civ 1127 *and explained in Michael Jones' Medical Negligence (4th Ed, 2008), para 12–011*.
>
> ...
>
> [98] *Aggravated damages have in fact been awarded as a separate head of damages by Malaysian courts. In the recent decision of this court in Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282, *the High Court's award of aggravated damages was upheld ...*
>
> [99] *It can be seen from the above cases that aggravated damages can be and have been awarded as a separate head of damage in tort. For example, aggravated damages are frequently awarded in defamation cases for injury to a person's reputation. There is no reason to exclude this kind of damages from medical negligence cases, which involve real injury to a person's body. In the circumstances, we answer the second question in the negative. As such, the doctors' appeal on quantum is dismissed*. (Emphasis added.)

[70] Secondly, contrary to Mr Felix Raj's submission, aggravated damages are to be distinguished from exemplary damages. Such a distinction had been explained by Zawawi Salleh JCA (as he then was) in the Court of Appeal case of *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784, at paras [32] and [33] as follows:

> [32] *Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant*.
>
> [33] *The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff* (*see Rookes v Barnard* [1964] 1 All E R 347; *AB v Southwest Water Services* [1993] All E R 609 *Broome v Cassell & Co* [1971] 2QB 354, *Laksamana Realty Sdn Bhd v Goh Eng Hwa and Another Appeal* [2006] 1 MLJ 675). (Emphasis added.)

Furthermore, according to s 8(2)(a) of the CLA, exemplary damages cannot be claimed in an estate/dependency suit. There is however nothing in ss 7 and 8 of the CLA which prevents the court from awarding aggravated damages in an estate/dependency suit.

[71] Thirdly, with regard to the question of whether there should be any proportionality between the amounts of general damages and aggravated damages, the following judgment in *Sambaga Valli*, at paras [40] and [41] is relevant:

> [40] *So too in [UK]. In Thompson v Commissioner of Police of Metropolis* [1997] 2 All ER 782, *Lord Woolf observed*:
>
> > *... We do not think it is possible to indicate a precise arithmetical relationship between basic damages and aggravate damages because the circumstances will vary from case to case. In the ordinary way, however, we should not expect the aggravated damages to be as such as twice the basic damage except perhaps where, on the particular facts, the basic damage are modest*.
>
> [41] *In the same vein, the Singapore Court of Appeal in Koh Sin Chong Freddie v Chan Cheng Wah Enterprise* [2012] 4 SLR 129 *stated at p 652*:
>
> > *... we are nonetheless of the view that there should be some semblance of proportionality between the quantum of damages and aggravated damages awarded ...; and ... Aggravated damages are meant to compensate for the aggravation of the injury; they are not an arbitrary top-up unrelated to the desire of the court to compensate the plaintiff for the aggravation*. (Emphasis added.)

[72] We express the following view regarding the court's discretionary power to award aggravated damages:

(1) firstly, the court can only exercise its discretion to grant aggravated damages when a defendant has been guilty of malicious, contumelious, offensive, outrageous and/or 'exceptional' behavior or conduct which had caused distress, anguish, misery, hurt and/or injury to the feelings of the plaintiff ('aggravating circumstances');

(2) even though an award of aggravated damages is a form of compensation to a plaintiff, in view of the requirement for the plaintiff to prove the existence of aggravating circumstances (so as to claim aggravated damages), the court should consider an award of aggravated damages separately from the court's assessment of special and general damages — please refer to *Dr Hari Krishnan*, at para [99];

(3) if the court is satisfied of the existence of aggravating circumstances, the court will then exercise its discretion to assess a just, appropriate and reasonable sum of aggravated damages ('quantum (aggravated damages)'). In deciding the quantum (aggravated damages), the court should take into account the following factors (which are not exhaustive):

(a) the nature and prevalence of the aggravating circumstances;

(b) the nature and extent of the distress, anguish, misery, hurt and/or injury to the feelings of the plaintiff;

(c) the court should ensure that a plaintiff is not unjustly enriched or overcompensated by the quantum (aggravated damages) and at the same time, the court should prevent a defendant from being financially ruined in an unjust manner ('two considerations') — please refer to *Motordata Research Consortium Sdn Bhd v Ahmad Shahril bin Abdullah & Ors* [2017] MLJU 1187; [2017] 7 AMR 560, at para [75](2). These two considerations are more important than any mathematical comparison between the quantum of aggravated damages and the total sum of general damages (as contended by the first defendant); and

(d) if the quantum (aggravated damages):

(i) exceeds the total amount of general and special damages ('total sum (general/special damages)');

(ii) constitutes a high percentage of the total sum (general/special damages),

– the court should give reasons for the quantum (aggravated damages). Only by giving reasons for the quantum (aggravated damages), can the court be said to have exercised its discretion judicially in the assessment of the quantum (aggravated damages).

(4) from the viewpoint of the stare decisis doctrine, the quantum (aggravated damages) decided in a particular case, is an exercise of the court's discretion based on the particular facts of the case. Hence, cases regarding the quantum (aggravated damages) do not constitute binding legal precedents.

[73] In this case, we are more than satisfied of the existence of aggravating circumstances on the part of the first defendant ('first defendant's exceptional conduct') which supported an award of RM350,000 as aggravated damages. The first defendant's exceptional conduct is as follows:

(1) the concealment (first defendant's guarantee letter request form) — please refer to the above sub-para 32(5)(b);

(2) the first defendant's misrepresentation (deceased's parents) which had induced the giving of an invalid PWTs consent (sinus surgery) — please refer to the above sub-para 32(5)(c);

(3) the embellishment (first defendant's notes) — please refer to the above sub-para 32(5)(a); and

(4) DW2's false expert evidence was given to bolster unlawfully the first defendant's defence against this suit — please refer to the above para 37.

[74] The first defendant's exceptional conduct, in our view, would explain the fact that the amount of aggravated damages (RM350,000) constituted a high percentage (about 64.7%) of the total sum (general/special damages) of RM541,000.

[75] We are satisfied that the sum of RM350,000 as aggravated damages:

(1) would not unjustly enrich or overcompensate the deceased's estate; or

(2) would not financially ruin the first defendant in an unjust manner.

[76] Premised on the evidence and reasons stated in the above paras 73 to 75, we unhesitatingly uphold the award of aggravated damages (RM350,000) against the first defendant.

[77] We find that the learned High Court judge had erroneously exercised his discretion in awarding aggravated damages (RM350,000) against the second defendant. This was because there were no aggravating circumstances on the part of the second defendant which could support, let alone justify, the award of aggravated damages (RM350,000) against the second defendant. On this ground alone, we set aside the award of aggravated damages (RM350,000) against the second defendant.

O. COULD THE HIGH COURT IMPOSE INTEREST AT THE RATE OF 8%PA ON THE GENERAL DAMAGES?

[78] It is not disputed that the learned High Court judge had a discretion pursuant to s 11 of the CLA and O 42 r 12 of the RC to impose interest at the rate of 8%pa on the general damages. However, we can take judicial notice of the present bank interest rates which do not exceed 5%pa. Hence, the High Court had imposed an excessively high interest rate on the general damages which would unjustly enrich the deceased's estate. Consequently, we reduce the interest rate on the general damages from 8%pa to 5%pa.

P. DID THE HIGH COURT ERR IN DECIDING THE FIRST DEFENDANT'S 80% CONTRIBUTION (THE SECOND DEFENDANT'S LIABILITY)?

[79] Firstly, as contended by Mr Felix Raj, the first defendant is estopped from disputing the second defendant's appeal against the High Court's decision regarding the first defendant's 80% contribution (second defendant's liability). The following reasons support this decision:

(1) at the High Court, the first defendant did not object to the second defendant's indemnity/contribution claim (first defendant); and

(2) the first defendant's memorandum of appeal ('MA') did not state that the first defendant was not liable to the second defendant for any contribution or indemnity in respect of the second defendant's liability to the deceased's estate. Rule 18(1) and (2) of the Rules of the Court of Appeal 1994 ('the RCA') provide as follows:

> r 18 Memorandum of appeal.
>
> (1) *The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided*; such grounds to be numbered consecutively.
>
> (2) *The appellant shall not without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.* (Emphasis added.)

The first defendant did not apply for leave of the Court of Appeal pursuant to r 21(1) of the RCA to amend the MA so as to include an objection to the High Court's decision regarding the first defendant's 80% contribution (second defendant's liability). We reproduce below r 21(1) of the RCA:

> r 21 *Amendments*
>
> (1) *The Court may at any time allow amendment of* any notice of appeal, or notice of cross-appeal, or *memorandum of appeal*, or other part of the record of appeal *on such terms as it thinks fit.*(Emphasis added.)

[80] In the interest of justice, we exercise our discretion under r 18(2) of the RCA and consider the first defendant's objection to the second defendant's appeal against the High Court's decision in respect of the first defendant's 80% contribution (second defendant's liability).

[81] We are of the view that the majority judgment (*Siow Ching Yee*) can be distinguished from this case because in *Siow Ching Yee*, the respondent hospital did not make the doctor (from whom the hospital sought an indemnity) a party to the appeal. According to the majority judgment (*Siow Ching Yee*), at paras [236] and [237]:

> [236] *Finally, a note on indemnity. The respondent has invited this court to order that the second defendant indemnify the respondent in the event that it is found liable. I do not find this to be right or available in law.*
>
> [237] *First, the second defendant is not a party to this appeal. More importantly, it flies in the face of the earlier findings that the respondent owes a non-delegable duty of care and it remains liable regardless to whom it may have employed or engaged to carry out*

that duty of care. The principle imposes a personal liability on the respondent, over and above that against the tortfeasor. (Emphasis added.)

[82] We have no hesitation to allow the second defendant's appeal in respect of the first defendant's 80% contribution (second defendant's liability). Our considered view is that the first defendant is 100% liable for the second defendant's liability to the deceased's estate in this case ('first defendant's 100% indemnity (second defendant's liability)'). The following reasons support the first defendant's 100% indemnity (second defendant's liability):

(1) cll 3.10.1 and 3.10.2 of the CA made it clear that the first defendant shall be liable for the first defendant's professional medical negligence. The learned High Court judge had failed to give effect to the express words in cll 3.10.1 and 3.10.2 of the CA; and

(2) s 10(1)(c) and (2) of the CLA provide as follows:

> s 10 *Proceedings against, and contribution between, joint and several tortfeasors*
>
> (1) *Where damage is suffered by any person as a result of a tort (whether a crime or not) —*
>
> ...
>
> (c) *any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought*.
>
> (2) *In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage, and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity*. (Emphasis added.)

In this case, the first defendant and second defendant were 'several tortfeasors' within the meaning of s 10(1) of the CLA as:

(a) the first defendant had committed professional medical negligence with respect to the deceased; and

(b) the second defendant had breached its non-delegabie duty of care owed to the deceased.

It is only 'just and equitable' under s 10(1)(c) and (2) of the CLA for the first defendant to indemnify 100% of the second defendant's liability to the deceased's estate because:

A (i) as explained in the above sub-para 32(5)(c), the first defendant's misrepresentation (deceased's parents) had induced the giving of PWTs consent (sinus surgery). The second defendant was neither party nor privy to the first defendant's misrepresentation (deceased's parents); and

B (ii) the first defendant should have waited for at least 24 hours for the outcome of Dr Raihanah's antibiotics administration (27 March 2014) before rushing to conduct the sinus surgery on the deceased at about 2.50pm, 28 March 2014. The decision to perform the sinus surgery was solely made by the first defendant.

C

Regrettably, learned counsel for the deceased's estate and second defendant did not draw the attention of the High Court to the applicability of s 10(1)(c) and (2) of the CLA in this case.

D

[83] For the avoidance of doubt, we do not accept the submission by the first defendant that the second defendant was not entitled to any indemnity or contribution from the first defendant due to the second defendant's breach (non-delegable duty of care). This is because if we have acceded to the above E submission:

(1) this will be contrary to the CA which the first defendant had voluntarily signed and upon which the first defendant had independently practiced his expertise at the Hospital. Such a decision will have grave and negative repercussions on the relationship between private hospitals and their F independent medical consultants; and

(2) this will render nugatory the clear intention of Parliament in s 10(1)(c) and (2) of the CLA. In this regard, with respect, the attention of the majority judgment (*Siow Ching Yee*) was not drawn to the application of G s 10(1)(c) and (2) of the CLA.

[84] In view of the first defendant's 100% indemnity (second defendant's liability), the first defendant shall indemnify the second defendant in full the following sums: H

(1) the special damages, general damages and the interest on the special damages and general damages for which the second defendant is liable to the deceased's estate; and

I (2) costs here and below which are payable by the second defendant to the deceased's estate.

Q. COSTS

[85] With regard to costs awarded in the High Court:

(1) we do not find any error of law and/or fact in the exercise of discretion by the learned High Court judge to impose GU (RM250,000) against the first defendant; and

(2) the sum of RM75,000 as GU awarded against the second defendant should be reduced because the High Court had erred as follows:

(a) the second defendant was not vicariously liable to the deceased's estate for the first defendant's professional medical negligence — please refer to the above para 44; and

(b) as explained in the above para 77, aggravated damages (RM350,000) should not have been awarded against the second defendant.

In view of the above two errors by the learned High Court judge, the sum of GU against the second defendant should be reduced to RM50,000.

[86] As for costs of these two appeals, we exercise our discretion pursuant to s 70 of the Courts of Judicature Act 1964 read with rr 54 and 96 of the RCA as follows:

(1) costs of the first defendant's appeal in a sum of RM70,000 shall be paid by the first defendant to the deceased's estate. This is because:

(a) the first defendant's appeal concerned technical medical issues and expert medical evidence;

(b) senior and experienced counsel in professional medical negligence cases had been retained to act for the deceased's estate in this case; and

(c) the record of appeal consisted of 15 volumes.

(2) the deceased's estate is only entitled to part of the costs of the second defendant's appeal because the second defendant is only liable to the deceased's estate for a breach of the second defendant's non-delegable duty of care to the deceased. Furthermore, the second defendant is not liable in aggravated damages to the deceased's estate. Accordingly, an amount of RM50,000 as costs for the second defendant's appeal shall be paid by the second defendant to the deceased's estate.

A R. CONCLUSION

[87] Premised on the above evidence and reasons:

(1) the first defendant's appeal is dismissed with the following order

B (a) the High Court's decision against the first defendant is affirmed with two variations, namely:

(i) costs (pre-trial discovery suit) in a sum of RM6,000 is set aside; and

C (ii) interest at the rate of 5%pa is imposed on the general damages.

(b) the first defendant shall pay to the deceased's estate costs of the first defendant's appeal in a sum of RM70,000 (subject to allocatur fee).

D (2) the second defendant's appeal is partly allowed and the following order is pronounced:

(a) the High Court's decision against the second defendant is varied as follows:

E (i) the first defendant's 100% indemnity (second defendant's liability) is ordered — please refer to the above para 84;

(ii) costs (pre-trial discovery suit) in a sum of RM6,000 is set aside;

(iii) the award of aggravated damages (RM350,000) is set aside;

F (iv) interest at the rate of 5%pa is imposed on the general damages; and

(v) costs in the High Court proceedings in a sum of RM75,000 (to be paid by the second defendant to the deceased's estate) shall be G reduced to RM50,000 (subject to allocatur fee).

(b) the second defendant shall pay to the deceased's estate an amount of RM50,000 as costs for the second defendant's appeal (subject to allocatur fee).

H *First defendant's appeal dismissed and second defendant's appeal allowed in part.*

Reported by Nabilah Syahida Abdullah Salleh

I